



1992

Forfeiture of Marital Property under 21 U.S.C. 881(a)(7): Irreconcilable Differences

Anne-Marie Feeley

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Criminal Law Commons](#)

Recommended Citation

Anne-Marie Feeley, *Forfeiture of Marital Property under 21 U.S.C. 881(a)(7): Irreconcilable Differences*, 37 Vill. L. Rev. 1487 (1992).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol37/iss5/6>

This Comment is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

1992]

FORFEITURE OF MARITAL PROPERTY UNDER 21 U.S.C. § 881(a)(7): IRRECONCILABLE DIFFERENCES?

I. INTRODUCTION

To wage the war on drugs more effectively, Congress has amended the drug enforcement laws to provide for the forfeiture of real and personal property.¹ Forfeitures under these laws may be either civil or criminal in nature.² Civil forfeitures, known as *in rem*³ proceedings, are conducted against property involved in the statutorily defined illegal activity, not against the property owner.⁴ By contrast, criminal forfeitures, known as *in personam*⁵ proceedings, are conducted against the owner of

1. See Michael Goldsmith & Mark Jay Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254, 1255-56 (forfeiture laws enacted as means to fight crimes such as narcotics trafficking and racketeering); see also Edith A. Landman & John Hieronymus, *Civil Forfeiture of Real Property Under 21 U.S.C. § 881(a)(7)*, 1991 MICH. BAR J. 174.

Congress amended the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Drug Control Act), in 1978 by adding § 881(a)(6). Psychotropics Substances Act of 1978, Pub. L. No. 95-633, § 301(1), 92 Stat. 3768, 3777 (current version at 21 U.S.C. § 881(a)(6) (1988)). The amendment of § 881 of the Drug Control Act provided for the seizure of "property furnished in exchange for illegal drugs or proceeds traceable to such an exchange." 21 U.S.C. § 881(a)(6) (1988). Then in 1984, Congress amended the Drug Control Act by passing comprehensive forfeiture provisions. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, §§ 301-323, 98 Stat. 2040-57 (codified as amended in scattered sections of 18 U.S.C., 19 U.S.C., 21 U.S.C.). The amendment of § 881 reflected the mandate of the Comprehensive Forfeiture Act of 1984, and "provide[d] for the forfeiture of real property . . . used to facilitate any felony drug violation of the Control Substances Act." *Id.* at § 306(a), 98 Stat. at 2050 (current version at 21 U.S.C. § 881(a)(7) (1988)). Thus, the amendments of the civil forfeiture provisions of the Drug Control Act arm the government with the tools needed to wage the drug war and to eliminate any profits gained through the sale of illegal drugs. *Id.*

2. See Landman & Hieronymus, *supra* note 1, at 174.

3. An *in rem* proceeding is "[a] technical term used to designate proceedings or actions against the thing." BLACK'S LAW DICTIONARY 793 (6th Ed. 1990).

4. See Dennis R. Hewitt, Comment, *Civil Forfeiture and Innocent Third Parties*, 1983 N. ILL. U. L. REV. 323, 325. Civil *in rem* forfeiture proceedings provide for the forfeiture of property used in an illegal act. *Id.* Such forfeiture is conducted solely against the property used in connection with the illegal act, regardless of the property owner's guilt or innocence. *Id.* Thus, an innocent property owner may be deprived of property that is used for illegal purposes despite the fact that he or she neither knew of nor consented to the illegal use. *Id.*; see also James R. Maxeiner, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 784 (1977).

5. An *in personam* proceeding is an "action seeking judgment against a person involving his personal rights and based on jurisdiction of his person." BLACK'S LAW DICTIONARY, *supra* note 3, at 791; see also Hewitt, Comment, *supra* note 4, at 325. In *in personam* forfeiture proceedings operate "directly against the defendant in a criminal prosecution, rather than his property, and any property

(1487)

property as punishment for involvement in criminal activity.⁶ Thus, regardless of a property owner's guilt or innocence, the property is subject to in rem forfeiture.⁷

Courts have consistently upheld the constitutionality of a wide range of civil in rem forfeiture statutes on the grounds that the government effects the forfeiture on the property and not on its owner.⁸ As a result, an innocent party may forfeit property under a civil forfeiture statute if the innocent owner's property is used by another in a manner prohibited by statute.⁹ Some statutes provide the innocent owner with a defense against forfeiture once the government establishes that probable cause exists to seize the property; however, the innocent owner has the burden of proving any statutory defenses.¹⁰

he has illegally acquired or maintained is subject to forfeiture." Goldsmith & Linderman, *supra* note 1, at 1260. Thus, in personam proceedings are only conducted against property owners convicted of the illegal activity and operate to punish the wrongdoer. *Id.*

6. See Hewitt, Comment, *supra* note 4, at 325. In order to conduct an in personam forfeiture of property, "the government must first obtain a conviction against the property owner." *Id.* at 325 n.11; see also Maxeiner, *supra* note 4, at 784-85 (indicating that in personam forfeiture requires the government to establish personal guilt of property owner in accordance with the form proscribed by the Constitution).

7. See Maxeiner, *supra* note 4, at 768. The theory underlying civil in rem forfeiture is that the property itself is guilty of wrongdoing. *Id.* Thus, the proceeding is conducted against the "guilty" property and not its owner. *Id.* In fact, "no suit need ever be brought against the owner, who may, in fact, be innocent of any wrongdoing." *Id.*

8. *Id.* The Supreme Court has endorsed the imposition of vicarious liability under statutes similar to the civil forfeiture statutes in the Drug Control Act:

[C]enturies of history support the Government's claim that forfeiture statutes similar to this one have extraordinarily broad scope Simply put, the theory has been that if the object is "guilty," it should be held forfeit. In the words of a medieval English writer, "Where a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner."

Id. (quoting *United States v. United States Coin & Currency*, 401 U.S. 715, 719-20 (1971)); see also *Goldsmith-Grant Co. v. United States*, 254 U.S. 505 (1921). In *Goldsmith*, the Supreme Court upheld the forfeiture of an automobile that was used to transport untaxed liquor in violation of a federal statute despite the automobile owner's innocence. *Id.* at 513. In reaching this conclusion, the *Goldsmith* Court reasoned that the property itself was guilty of wrongdoing, and thus was subject to forfeiture. *Id.*

9. See Susan J. Parcels, Comment, *An Analysis of Federal Drug-Related Civil Forfeiture*, 34 ME. L. REV. 435, 436 (1982). In order to justify civil in rem forfeiture today, the government relies upon the "personification theory." *Id.* The personification theory provides that the property itself is guilty of the wrongdoing. *Id.*; see also Hewitt, Comment, *supra* note 4, at 332 (noting that "an innocent person whose property is used by another in the commission of an offense may find that his property is subject to civil forfeiture").

10. Goldsmith & Linderman, *supra* note 1, at 1261-62. The government must establish probable cause by linking the property to illegal drug activity. *Id.* at 1261; see also Landman & Hieronymus, *supra* note 1, at 177. In order to meet the burden of proof in a civil forfeiture action under 21 U.S.C. § 881(a)(7)

The Comprehensive Drug Abuse Prevention and Control Act of 1970¹¹ (Drug Control Act) provides for the civil forfeiture of real and personal property used to facilitate illegal drug trade.¹² Congress enacted the Drug Control Act to enable law enforcement officials to stem the rising tide of narcotics trafficking and to deter drug abuse in the United States.¹³ As originally enacted, the Drug Control Act included a civil forfeiture mechanism in § 881 which mandated the forfeiture of vehicles, drug paraphernalia and raw materials used to facilitate illegal drug activity.¹⁴ Because the proceedings under § 881 are in rem, the property owner's criminal conviction is not required before commencing

(1988), "the government must have probable cause to connect the real estate with the illegal drug activity, but is not required to link the property to a particular transaction." Landman & Hieronymus, *supra* note 1, at 177. The government may rely on both circumstantial evidence and hearsay evidence to establish probable cause. *Id.* at 177-78.

Once the government establishes probable cause, the "burden shifts to the claimant to prove by a preponderance of the evidence that the forfeiture is inappropriate because: 1) the real property was not used to facilitate the commission of a drug offense; or 2) any such use was without the claimant's 'knowledge or consent.'" Goldsmith & Linderman, *supra* note 1, at 1262. If the claimant fails to meet the burden, a mere showing of probable cause will sustain a judgment of forfeiture. *Id.*

11. 21 U.S.C. §§ 801-971 (1988).

12. 21 U.S.C. § 881(a)(7). In pertinent part, § 881(a)(7) provides:

(a) Subject Property

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

.....
(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Id.

13. See Landman & Hieronymus, *supra* note 1, at 174. Congress enacted the Drug Control Act as part of its effort to fight the proliferation of the illegal drug trade in the United States. *Id.* The civil forfeiture provisions in § 881 of the Drug Control Act were designed to take "the profit out of the business of illicit drug sales." *Id.*; see also Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 167 (1990) (indicating that by enacting the Drug Control Act, Congress intended "to use forfeiture to deter and punish drug traffickers . . . 'by removing its leaders from positions of ownership, . . . and by visiting heavy economic sanctions on their predatory business practices'" (quoting Senator Robert Byrd, 116 Cong. Rev. 1970)).

14. See Landman & Hieronymus, *supra* note 1, at 174 (noting that "[§] 881(a)(7) is specifically directed at the real property that is used as a 'container' for illegal drugs").

ing a proceeding against the property involved.¹⁵

Soon after the enactment of the Drug Control Act, however, it became apparent that the forfeiture provisions in § 881 needed strengthening.¹⁶ In 1978, Congress amended § 881¹⁷ to include the forfeiture of real property received in exchange for illegal drugs or any proceeds traceable to such transactions.¹⁸

Despite the 1978 amendment, drug trafficking and abuse proliferated.¹⁹ In response, Congress enacted the Comprehensive Forfeiture Act of 1984 (Comprehensive Forfeiture Act).²⁰ The Comprehensive Forfeiture Act demonstrates Congress' attempt to enhance and to strengthen the scope of the forfeiture provisions in the Drug Control Act.²¹ The 1984 amendment of § 881 provides for the forfeiture of all real property used "to facilitate any felony drug violations of the Controlled Substances Act."²² Prior to the amendment, real property could not be forfeited under § 881 unless the government demonstrated that profits from illegal drug transactions were used to purchase the real property.²³ With the enactment of the 1984 amendment, Congress

15. *Id.* at 174-76.

16. *Id.* at 174.

17. 21 U.S.C. § 881(a)(6) (1988). Section 881(a)(6) provides:

All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Id.

18. *Id.*

19. Landman & Hieronymus, *supra* note 1, at 174 (Forfeiture laws had failed to be "a powerful weapon to federal law enforcement agencies.").

20. Pub. L. No. 98-473, §§ 301-323, 98 Stat. 2040-57 (1984) (codified as amended in scattered sections of 18 U.S.C., 19 U.S.C., 21 U.S.C.); *see also* Landman & Hieronymus, *supra* note 1, at 174.

21. S. REP. NO. 225, 98th Cong., 1st Sess. 191, 191 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3374-3404. Congress recognized that traditional criminal sanctions were not sufficient to deter the rapid growth of the illegal drug trade in the United States. *Id.*, *reprinted in* 1984 U.S.C.C.A.N. at 3374. Thus the bill was designed to extend the scope of the forfeiture provisions to real property used to facilitate the "commission of a major drug offense." *Id.* at 195, *reprinted in* 1984 U.S.C.C.A.N. at 3378. Section 306 of the Comprehensive Forfeiture Act of 1984 provided for the amendment of the Drug Control Act by adding § 881(a)(7), "which provides for the civil forfeiture of a variety of drug-related property" used or intended to be used in violation of the Drug Control Act. *Id.* at 215, *reprinted in* 1984 U.S.C.C.A.N. at 3398.

22. *See* Landman & Hieronymus, *supra* note 1, at 174.

23. *Id.* Prior to the 1984 amendment of the Drug Control Act, § 881 only provided for the forfeiture of property used to manufacture or transport illegal drugs. S. Rep. 225, *supra* note 21, at 195, *reprinted in* 1984 U.S.C.C.A.N. at 3378.

achieved its objective of providing law enforcement officials with a more potent means to check the ever-swelling tide of drug trafficking in the United States.

Although such an objective is necessary, the civil forfeiture provisions of the Drug Control Act have had an unsettling impact on state laws defining marital property.²⁴ Tension between the federal and state laws has arisen and is especially acute in those jurisdictions that recognize tenancy by the entirety.²⁵ A tenancy by the entirety is a common law concept of property ownership unique to married persons, which deems that each spouse owns an indivisible interest in the whole of jointly titled property.²⁶ This interest is severable only upon the death of one spouse, divorce or the agreement of both spouses.²⁷ Where the jointly titled property is subject to forfeiture, uncertainty arises with respect to the ownership rights of innocent spouses and the subsequent

Section 881 did not provide for the forfeiture of real property used to store or to facilitate the manufacture of illegal drugs. *Id.* Thus, the 1984 amendment of § 881(a) armed law enforcement officials with another weapon to fight the drug war by subjecting real property to civil forfeiture when it is used in connection with illegal drug activity. *See id.*

24. *See United States v. 15621 S.W. 109th Ave.*, 894 F.2d 1511, 1518-19 (11th Cir. 1990). The Eleventh Circuit noted that a tension between the application of federal forfeiture laws and state marital property laws arose in jurisdictions recognizing tenancy by the entirety as a form of property ownership for married couples. *Id.* at 1519. The court held that state law determines the property rights of individuals while federal law operates to effect the punishment of the wrongdoer under the Drug Control Act. *Id.* at 1518-19. When a spouse who holds property in tenancy by the entirety is deemed an innocent owner under the innocent owner defense in § 881(a)(7) of the Drug Control Act, the court concluded that § 881(a)(7) barred the forfeiture of any part of the marital property because the innocent spouse owned an indivisible interest in the entire property. *Id.* at 1512.

For a discussion of the analysis of the Eleventh Circuit in *15621 S.W. 209th Avenue*, see *infra* notes 157-79 and accompanying text.

25. *See Landman & Hieronymus, supra* note 1, at 180.

26. *See CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY* 218-19 (2d ed. 1988). Tenancy by the entirety is a common law notion of property ownership unique to husband and wife which provides for joint ownership of property with a right of survivorship. *Id.* The concept provides that "tenants by the entirety are seized of the whole and not of a share" of property. *Id.* To establish a tenancy by the entirety, the four unities of "time, title, interest and possession" must exist. *Id.* at 218. An estate held as a tenancy by the entirety cannot be severed unilaterally by one spouse although the spouses may voluntarily choose to terminate the estate. *Id.* at 222-23.

Tenancy by the entirety exists in twenty-two states. *Id.* at 220. Jurisdictions that retain tenancy by the entirety as a form of real property ownership include: Alaska, Arkansas, Delaware, District of Columbia, Florida, Hawaii, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia and Wyoming. *Id.* at 220 n.1.

27. *Id.* at 222-23. A tenancy by the entirety will be terminated by operation of law, upon the death of one spouse or divorce. *Id.*

disposition of such real property.²⁸

This Comment will focus on § 881 of the Drug Control Act, which provides for the civil forfeiture of real property used to facilitate illegal drug transactions in violation of federal law, and its effect on property owned by husband and wife as tenants by the entirety. This Comment will provide an overview of the current status of the law with respect to the ownership rights of an innocent spouse and the rights of the federal government when federal forfeiture law and state marital property laws conflict. To accomplish this objective, this Comment will outline the history of forfeiture law, the general theory underlying the forfeiture provisions of § 881, and will then review the statutory language of § 881. Finally, this Comment will analyze recent decisions which address conflicts that arise between forfeiture law and marital property law when § 881 is used to effect civil forfeiture.

II. BACKGROUND

A. *The Origins of Forfeiture Law*

In the United States, the concept of forfeiture has been recognized "since the adoption of the United States Constitution,"²⁹ and thereafter has been incorporated into the statutory law.³⁰ There are two types of statutory forfeiture in the United States: in rem proceedings and in personam proceedings.³¹ The former are civil forfeiture proceedings conducted against the offending property regardless of its owner's guilt or innocence.³² The latter are criminal forfeiture proceedings conducted against a convicted felon's property as punishment for violating the law.³³

28. See Landman & Hieronymus, *supra* note 1, at 180. Section 881(a)(7), which provides for forfeiture of real estate, is a relatively new provision which is still being interpreted by the courts. *Id.* at 181. The application of § 881(a)(7) and the resulting seizure of real property are still determined on a fact-specific basis by the courts. *Id.* Thus, "it is difficult to predict with any certainty the future of real property forfeitures" under the statute. *Id.*

29. Bruce C. Conybeare, Jr., Note, *Federal Civil Forfeiture: An Ill-Conceived Scheme Unfairly Deprives an Innocent Party of Its Property Interest*, 62 U. DET. L. REV. 87, 90 (1984).

30. See Conybeare, Note, *supra* note 29, at 90-93 (discussing history of forfeiture laws in United States); see, e.g., Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1963, 84 Stat. 911, 943 (current version at 18 U.S.C. § 1963 (1988 & Supp. III 1991)) (Racketeer Influenced and Corrupt Organizations (RICO) forfeiture provision); Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408, 84 Stat. 1236, 1265-66 (current version at 21 U.S.C. § 848 (1988)) (Continuing Criminal Enterprise (CCE) forfeiture provision).

31. See Hewitt, Comment, *supra* note 4, at 324-25.

32. *Id.* at 325. For a further discussion of in rem forfeiture, see *supra* notes 3-4 and accompanying text.

33. Hewitt, Comment, *supra* note 4, at 325. For a further discussion of in personam forfeiture, see *supra* notes 5-6 and accompanying text.

The origins of both in rem and in personam forfeiture proceedings can be traced to the English law of forfeiture.³⁴ English law provided for three types of forfeiture: (1) the institution of deodand, (2) the common law of forfeiture, and (3) statutory forfeiture.³⁵ The institution of deodand is an ancient concept based on the Old Testament.³⁶ Deodands were "objects, including immovable ones, that caused the death of a human being."³⁷ This fiction provided that the instrument of death was subject to forfeiture as a means of atonement for the loss of human life.³⁸ This concept eventually expanded from the forfeiture of objects involved in the killing of a human being to objects involved in criminal activity.³⁹ Such property was subject to forfeiture regardless of its owner's guilt or innocence.⁴⁰ The property, as the offending object, was forfeited to the sovereign and became an additional source of revenue.⁴¹ Although England formally abolished the institution of deodand in 1846, "the concept of forfeiting property involved in illegal activity continued."⁴² Thus, the evolution of the institution of deodand in England provided the foundation for the modern institution of in rem forfeiture.

The second type of forfeiture recognized in England was common-law forfeiture.⁴³ Common-law forfeitures were in personam actions conducted subsequent to an individual's conviction for a felony or treason.⁴⁴ The convicted felon or traitor forfeited all real and personal

34. Hewitt, Comment, *supra* note 4, at 329.

35. *See id.* at 326-29.

36. *Id.* at 326-27. One commentator has noted:

The origins of forfeiture have been traced to one of the Old Testament laws which God gave to Moses: "[I]f an ox gore a man or woman, that they die then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit."

Id. at 326 (quoting *Exodus* 21:28 (King James)). The origins of in rem forfeiture are rooted in this Old Testament passage and reflect the view that the property itself is guilty of the wrongdoing. *Id.* at 327.

37. *Id.* "[D]eodand" is derived from the Latin term *deo dandum*, which is interpreted as a thing to be given to God." *Id.* at 327 n.22.

38. *Id.* at 327. The theory underlying the institution of deodand provided that the property itself committed the offense, and therefore was forfeited to the sovereign regardless of its owner's guilt or innocence. *Id.* The property owner could not recover the property or its value even if the owner was entirely innocent of any wrongdoing. *Id.*

39. *Id.* at 328 (citing *Regina v. Woodrow*, 153 Eng. Rep. 907 (Ex. 1846) (upholding forfeiture of goods manufactured in violation of law despite innocent purchaser's lack of knowledge)).

40. *Id.*

41. *Id.*; *see also* Conybeare, Note, *supra* note 29, at 90 ("Over time, deodand evolved from a means for religious expiation to a source of revenue for the sovereign as the offending property, having been used to commit a felony, became the property of the sovereign.").

42. Hewitt, Comment, *supra* note 4, at 328.

43. *Id.*

44. *Id.* Under English common law, forfeiture could not be effected until a

property to the sovereign as punishment for the criminal activity.⁴⁵

The third type of forfeiture recognized by English law, statutory forfeiture, was imposed upon violation of customs and revenue laws.⁴⁶ Statutory forfeitures were in rem proceedings, whereby the property itself was treated as the offending party and subjected to forfeiture upon occurrence of a statutory violation.⁴⁷ Thus, the guilt or innocence of the property owner was not considered.

B. *Early Forfeiture Law in the United States*

The concept of deodand was not incorporated into the common law of the United States, however, in rem forfeiture has been incorporated into federal statutory law since the adoption of the United States Constitution.⁴⁸ The United States Supreme Court has consistently held that statutory in rem forfeitures are constitutional despite their potential effect on innocent property owners.⁴⁹ In *Calero-Toledo v. Pearson Yacht Leasing Co.*,⁵⁰ the Supreme Court upheld a Puerto Rico statute that provided for the seizure and forfeiture of vessels used to transport or facilitate the transportation of controlled substances, regardless of the vessel owner's innocence.⁵¹ In *Calero-Toledo*, the owner of a seized yacht challenged the constitutional validity of the statute on two grounds.⁵² First, the owner contended that such forfeiture was unconstitutional without prior notice and an adversary hearing to determine the property of the seizure.⁵³ The *Calero-Toledo* Court rejected this line of reasoning and concluded that the statute was constitutional because it served a signifi-

party had been convicted of a felony or convicted of treason. *Id.* Once convicted, the party's real and personal property was subject to forfeiture. *Id.* The justification for in personam forfeiture lay in the notion that a conviction for treason or felony resulted in a breach of the King's peace which required remuneration. *Id.*

45. *Id.* at 328 n.35.

46. *Id.* at 328-29. Statutory forfeitures differed from common-law forfeitures in that the court only considered the wrongful use of the property, i.e., the forfeitures did not arise upon a conviction of the defendant. *Id.* at 329.

47. *Id.*

48. See Conybeare, Note, *supra* note 29, at 90 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682-83, *reh'g denied*, 417 U.S. 977 (1974)). In *Calero-Toledo*, the Supreme Court traced the development of forfeiture statutes in the United States. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682-83, *reh'g denied*, 417 U.S. 977 (1974). The Supreme Court followed the history of forfeiture from its biblical origins to English common law and then to its subsequent adoption and proliferation in the United States. *Id.* at 680-83. The *Calero-Toledo* Court also noted that the defense of innocent ownership has almost always been rejected when forfeiture statutes are violated unless the statute specifically provides for such a defense. *Id.* at 683.

49. *Calero-Toledo*, 416 U.S. at 683.

50. 416 U.S. 663, 689-90, *reh'g denied*, 417 U.S. 977 (1974).

51. *Id.*

52. *Id.* at 668.

53. *Id.* at 668, 676-77.

cant government interest.⁵⁴ Second, the owner claimed that the statute was unconstitutional because it authorized a government taking of property without just compensation.⁵⁵ The Supreme Court also rejected this argument based on the historical background of forfeiture statutes and precedent establishing their constitutionality.⁵⁶

In rejecting the arguments in *Calero-Toledo*, the Supreme Court outlined the precedent sustaining the validity of statutory in rem forfeiture as applied to innocent property owners.⁵⁷ The *Calero-Toledo* Court noted that the Supreme Court first addressed the validity of statutory in rem forfeiture in 1827 in *The Palmyra*.⁵⁸ In that case, the Court held that

54. *Id.* at 678-80. In *Calero-Toledo*, the Supreme Court relied on *Fuentes v. Shevin*, 407 U.S. 67, 86-87, *reh'g denied*, 409 U.S. 902 (1972), to reject the vessel owner's claim that the statute was unconstitutional because it failed to provide for a pre-seizure notice and hearing. *Calero-Toledo*, 416 U.S. at 677. In *Fuentes*, the Supreme Court held that immediate seizure of property is justified in certain circumstances without a prior notice or a prior hearing. *Fuentes*, 407 U.S. at 90-91. Such circumstances arise when:

[S]eizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Id. at 91.

In *Calero-Toledo*, the owner of the vessel, a yacht leasing company, sought a declaration that the statute was unconstitutional because it failed to provide for pre-seizure notice and hearing. *Calero-Toledo*, 416 U.S. at 668. Applying the *Fuentes* test to the Puerto Rican statute, the Court concluded that postponement of a pre-seizure notice and hearing was justified. *Id.* at 678-79. The *Calero-Toledo* Court reasoned that the statute served significant government purpose:

First, seizure . . . permits Puerto Rico to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions. Second, pre-seizure notice and hearing might frustrate the interests served by the statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given. And finally, unlike the situation in *Fuentes*, seizure is not initiated by self-interested private parties; rather, Commonwealth officials determine whether seizure is appropriate under the provisions of the Puerto Rican statutes.

Id. at 679.

55. *Calero-Toledo*, 416 U.S. at 680. The Supreme Court also rejected this argument and found “that statutory forfeiture schemes are not rendered unconstitutional because of their applicability to the property interest of” an innocent owner. *Id.*

56. *Id.* The Supreme Court relied on the historical background and precedent of in rem forfeiture which holds the property itself guilty of wrongdoing. *Id.* For a further discussion of English forfeiture law, see *supra* notes 29-47 and accompanying text.

57. *Calero-Toledo*, 416 U.S. at 680-85.

58. *Id.* at 683 (discussing *The Palmyra*, 25 U.S. (12 Wheat) 1 (1827)).

a "conviction for piracy was not a prerequisite to a proceeding to forfeit a ship allegedly engaged in piratical aggression in violation of a federal statute."⁵⁹ The Court based its decision on the historical acceptance of in rem forfeitures attaching to a guilty object, and not to its owner.⁶⁰ Thus, *The Palmyra* Court determined that the in rem forfeiture of a vessel was proper despite the innocence of its owner.⁶¹ The Court further opined that a "proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam."⁶²

To provide additional support for the proposition that the innocent owner defense has long been insufficient to negate the effect of a statutory in rem proceeding, the *Calero-Toledo* Court relied upon the nineteenth century case of *Dobbins' Distillery v. United States*.⁶³ In *Dobbins' Distillery*, an innocent lessor was forced to forfeit all real and personal property to the government pursuant to an in rem statutory forfeiture law.⁶⁴ The *Dobbins' Distillery* Court found that the statutory violation "attached primarily to the distillery . . . without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee [distiller] as a distillery."⁶⁵ The *Calero-Toledo* Court emphasized that decisions supporting this proposition have continued into this century.⁶⁶

Based on the extensive precedent and common-law tradition, the *Calero-Toledo* Court found the forfeiture of the yacht involved in illegal activity constitutional under the Puerto Rican statute.⁶⁷ The Court con-

59. *The Palmyra*, 25 U.S. (12 Wheat) 1, 14-15 (1827).

60. *Id.* at 14. ("The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be *malum prohibitum*, or *malum in se*.").

61. *Id.* at 18.

62. *Id.* at 15.

63. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 685-86 (discussing *Dobbins' Distillery v. United States*, 96 U.S. 395, 397 (1878), *reh'g denied*, 417 U.S. 977 (1974)).

64. *Dobbins' Distillery v. United States*, 96 U.S. 421, 400-02 (1878). The lessor was forced to forfeit real and personal property used by the lessee in violation of revenue laws. *Id.* at 402-04. The lessee had failed to keep the proper records with respect to the distillery, thereby violating a federal revenue statute. *Id.* at 396.

65. *Id.* at 401.

66. *Calero-Toledo*, 416 U.S. at 685; see, e.g., *van Oster v. Kansas*, 272 U.S. 465, 467-68 (1926) (holding that state liquor prohibition law providing for forfeiture of innocent owner's automobile not violative of Fourteenth Amendment); *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 510-11 (1921) (holding that federal tax-fraud forfeiture statutes providing for forfeiture of innocent owner's property not violative of Fifth Amendment).

67. *Calero-Toledo*, 416 U.S. at 686. In *Calero-Toledo*, the Supreme Court found that the statute served significant government interests by "preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Id.* at 687.

cluded that the imposition of such a harsh economic penalty not only served the punitive and deterrent purposes underlying the statute, but also encouraged further vigilance by inducing property owners to "exercise greater care in transferring possession of their property."⁶⁸ Thus, the *Calero-Toledo* Court validated the application of statutory in rem forfeiture proceedings against innocent owners of property.

In contrast to civil forfeiture, "criminal forfeiture traditionally [has not been] part of American law."⁶⁹ It was not until 1970 that Congress enacted two statutes providing for criminal forfeiture.⁷⁰ These statutes allow the government to conduct in personam proceedings against a criminal defendant.⁷¹ The availability of forfeiture of property owned by the criminal defendant, however, is conditioned upon a conviction for the underlying substantive offense.⁷²

In summary, the present American law of forfeiture can be traced to the English law of forfeiture. American civil in rem forfeiture proceedings are incorporated as part of statutory law, and have been validated through case law. Civil in rem forfeiture, like its English predecessor, is conducted solely against the offending object and not against its owner.⁷³ Also, again similar to English precedent, criminal in personam forfeiture depends upon the conviction of the criminal defendant before the subject property can be seized.⁷⁴

C. Civil Forfeiture Under the Drug Control Act

1. Interpretation and Application of § 881

The following overview will explore the relevant provisions of § 881 of the Drug Control Act and provide the reader with a reference point from which to evaluate the case law interpreting the forfeiture of marital property held by spouses as tenants by the entirety.

In 1970, Congress enacted the Drug Control Act to reduce illegal

68. *Id.* at 688.

69. Conybeare, Note, *supra* note 29, at 92.

70. *Id.* at 92 & n.50. In 1970, Congress enacted two statutes that included criminal forfeiture provisions: (1) the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1963 84 Stat. 922, 943 (current version at 18 U.S.C. § 1963 (1988 & Supp. III 1991)) (Racketeer Influenced and Corrupt Organizations (RICO) forfeiture provision); and (2) the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408 84 Stat. 1236, 1265-66 (current version at 21 U.S.C. § 848 (1988)) (Continuing Crime Enterprise (CCE) forfeiture provision). See also Maxeiner, *supra* note 4, at 768 n.6, 792-93 (noting that Congress expected these forfeitures to be part of criminal prosecution).

71. Conybeare, Note, *supra* note 29, at 93.

72. *Id.*

73. See *id.* at 91. For a further discussion of in rem forfeiture, see *supra* notes 3-4 and accompanying text.

74. See Conybeare, Note, *supra* note 29, at 92-93. For a further discussion of in personam forfeiture, see *supra* notes 5-6 and accompanying text.

drug trade and to encourage the rehabilitation of drug abusers.⁷⁵ To attain its goal, Congress included a civil forfeiture provision—§ 881.⁷⁶ Section 881 attempts to remove the economic incentive from illegal drug activity by providing for in rem forfeiture of specific types of property.⁷⁷ Under the relation-back provision⁷⁸ of § 881, title in the forfeited property vests in the United States government immediately upon a substantive violation of the Drug Control Act.⁷⁹ This provision enables the government to seize the subject property at the moment it is used to facilitate a violation of the Drug Control Act.⁸⁰ The forfeiture occurs regardless of whether its owner is convicted of a substantive offense under the Drug Control Act.⁸¹

The seizure of property is constitutional because the statute codifies the legal fiction of in rem forfeiture.⁸² In rem forfeiture provides that

75. See Landman & Hieronymus, *supra* note 1, at 174; see also Sean D. Smith, Comment, *The Scope of Real Property Forfeiture for Drug-Related Crimes Under the Comprehensive Forfeiture Act*, 137 U. PA. L. REV. 303 (1988) (discussing use of 21 U.S.C. § 853 forfeiture provisions to stem "the growing menace of drug abuse in the United States" (quoting H.R. REP. NO. 1444, 91st Cong., 2d Sess., pt. 1, at 1, reprinted in 1970 U.S.C.C.A.N. 4566, 4567)).

76. See Landman & Hieronymus, *supra* note 1, at 174. As enacted, the civil forfeiture provisions of the Drug Control Act in § 881 reached only certain types of property used to manufacture and to transport illegal drugs. *Id.* Section 881, however, was subsequently amended in 1978 and again in 1984 to extend the reach of the civil forfeiture provisions to property and proceeds furnished in exchange for illegal drugs and to real property used in connection with illegal drug transactions. *Id.*

77. See *id.*; see generally 21 U.S.C. § 881 (1988).

78. 21 U.S.C. § 881(h). Section 881(h) provides: "All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section." *Id.* (emphasis added).

79. *Id.* Section 881(h) is the codification of the relation-back doctrine. The relation-back doctrine deems property subject to forfeiture at the moment of the violation of the Drug Control Act. See Anton R. Valukas & Thomas P. Walsh, *Forfeitures: When Uncle Sam Says You Can't Take It With You*, 14 LITIG. 31, 36 (1988); see also *United States v. 15621 S.W. 209th Ave.*, 699 F. Supp. 1531, 1536 (S.D. Fla. 1988) (holding home subject to forfeiture at moment defendant made cocaine sale), *aff'd*, 894 F.2d 1511 (11th Cir. 1990); Landman & Hieronymus, *supra* note 1, at 176 (indicating that relation-back doctrine vests title in government at moment when property used in prohibited manner).

80. 21 U.S.C. § 881(b), (d).

81. See, e.g., *U.S. v. One Rural Lot*, 739 F. Supp. 74, 77 (D.P.R. 1990) (holding that civil forfeiture is not contingent upon criminal conviction of property owner; civil forfeiture is based on legal fiction that seized property guilty of wrongdoing).

82. See *United States v. 2525 Leroy Lane*, 910 F.2d 343, 346 (6th Cir. 1990) (noting that forfeiture under § 881(a)(7) is in rem proceeding based on legal fiction of property as wrongdoer), *cert. denied sub nom. Marks v. U.S.*, 111 S. Ct. 1414 (1991); see also Valukas & Walsh, *supra* note 79, at 36 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680, *reh'g denied*, 417 U.S. 977 (1974)) (holding that statutory in rem forfeiture schemes constitutional when applied to property interests of innocents); *Parcels*, *supra* note 9, at 442 (noting

the subject property is guilty of the wrongdoing, and therefore can be seized by the government upon a showing of probable cause.⁸³ An innocent owner, however, is not without recourse because § 881 includes a statutory defense for innocent owners whose property is subject to seizure.⁸⁴

The scope of § 881 has evolved since its enactment. When the Drug Control Act was enacted in 1970, forfeiture under § 881 was limited to the seizure of vehicles, equipment and raw materials used to facilitate felony drug violations.⁸⁵ By 1984, however, § 881 had been amended to include § 881(a)(7), which provides for the forfeiture of real property.⁸⁶ Pursuant to subsection 881(a)(7), the real property that is subject to forfeiture is "real property . . . used to facilitate any felony drug violation" of the Drug Control Act.⁸⁷ As a result, law enforcement officials have the authority to seize real property under an in rem proceeding at the moment the felony drug violation occurs.⁸⁸

In order to invoke the forfeiture provisions of § 881(a)(7), the government need only demonstrate that probable cause exists to believe that the subject property was used in violation of the Drug Control Act.⁸⁹ In *United States v. 28 Emery Street*,⁹⁰ the United States Court of Appeals for the First Circuit stated that "[p]robable cause to forfeit [real property] requires only a 'reasonable ground for belief of guilt[,] supported by less than prima facie proof but more than mere suspicion' that the property is subject to forfeiture."⁹¹ The First Circuit further noted

that constitutional protection not available to innocent property owners against in rem forfeiture).

83. See, e.g., *United States v. 28 Emery St.*, 914 F.2d 1, 3 (1st Cir. 1990). For a discussion of in rem forfeiture, see *supra* notes 3-4 and accompanying text.

84. 21 U.S.C. § 881(a)(7). In pertinent part, § 881(a)(7) provides: "[E]xcept that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." *Id.*

85. See Landman & Hieronymus, *supra* note 1, at 174.

86. For details of the amendments, see *supra* notes 16-23 and accompanying text.

87. See Landman & Hieronymus, *supra* note 1, at 174; see also Jankowski, Note, *supra* note 13, at 170-71. For the full text of § 881(a)(7), see *supra* note 12.

88. See *United States v. 28 Emery St.*, 914 F.2d 1, 3 (1st Cir. 1990) ("One of the most powerful weapons in the government's arsenal in the continuing 'war' on drugs is its ability to obtain the civil forfeiture of property that is used for or facilitates violations of the drug laws."); see also Jankowski, Note, *supra* note 13, at 170 (Congress passed Comprehensive Forfeiture Act of 1984 to enhance statutory civil forfeiture mechanisms that were traditionally plagued by limitations and ambiguities).

89. *28 Emery St.*, 914 F.2d at 3 (citing *United States v. \$250,000 in United States Currency*, 808 F.2d 895, 897 (1st Cir. 1987)).

90. 914 F.2d 1 (1st Cir. 1990).

91. *Id.* at 3; see also Landman & Hieronymus, *supra* note 1, at 177 (stating that "[p]robable cause must be judged not with clinical detachment but with a common sense view to the realities of normal life").

that once the government demonstrates probable cause, the "burden shifts to the claimant to show by a preponderance of the evidence that the property was not used in violation of the statute or it was so used without the owner's knowledge or consent."⁹² Therefore, while the language of § 881(a)(7) provides for the civil forfeiture of property used to violate federal narcotics laws, it also provides a defense of innocence for the owner who can demonstrate that the property was not used in violation of federal narcotics laws, or that he or she did not know of or consent to such activity.⁹³

Two predominant questions of interpretation arise with respect to two clauses in § 881(a)(7). The first question concerns the interpretation of the term "facilitate" in determining whether the property was "used to facilitate any drug felony violation."⁹⁴ The second involves the scope of the innocent owner defense incorporated in § 881(a)(7).⁹⁵ Although the courts are split, judicial interpretation of the clauses provides some insight into the meaning of the statutory language in § 881(a)(7).

2. When Does Property "Facilitate" a Felony Drug Violation?

Judicial consideration of the term "facilitate" has yielded two predominant lines of case law.⁹⁶ The United States Court of Appeals for the First and Fourth Circuits have concluded that there must be a "substantial connection" between the forfeited property and the illegal drug activity. In *United States v. One Parcel of Real Property*,⁹⁷ the First Circuit concluded that the affidavits of a government drug enforcement official alleging the existence of drugs, drug paraphernalia and cash on the property established a "substantial connection" between the property and the drug trafficking, thus rendering the claimants' home

92. *Emery St.*, 914 F.2d at 3 (citing *United States v. 5 Bell Rock Road*, 896 F.2d 605, 606 (1st Cir. 1990)); see also 21 U.S.C. § 881(a)(7) (1988) (innocent owner defense); *United States v. Certain Real Property*, 724 F. Supp. 908, 913-14 (S.D. Fla. 1989).

93. See 21 U.S.C. § 881(a)(7); see also *Parcels*, Comment, *supra* note 9, at 440 (discussing procedure available to establish innocent ownership). The government has the initial burden to establish probable cause. *Id.* at 441. Probable cause is found when "the facts support a reasonable belief that the property has been used in violation of the Drug Control Act." *Id.* at 441-42. Once the government establishes probable cause, the property owner can rebut the charge with a showing of innocence by a preponderance of the evidence. *Id.* at 442.

94. See *Parcels*, Comment, *supra* note 9, at 443 (discussing interpretation of § 881(a)(7) language).

95. See *id.*

96. See *Landman & Hieronymus*, *supra* note 1, at 178. Despite the differing judicial interpretations of the term "facilitate," the "resolution of the question of whether real property has been used to facilitate an underlying drug offense focuses on the degree of the property's involvement in the criminal activity and is a question of fact." *Id.*

97. 900 F.2d 470 (1st Cir. 1990).

forfeitable.⁹⁸

In *United States v. Schifferli*,⁹⁹ the Fourth Circuit also adopted the "substantial connection" test, but cautioned that the property could only be rendered forfeitable under § 881(a)(7) if its connection to the illegal drug activity was "[a]t minimum . . . more than incidental or fortuitous."¹⁰⁰ The Fourth Circuit found the property in question, a dentist's office, substantially connected to illegal drug activity, thus rendering it forfeitable under § 881(a)(7).¹⁰¹ The dentist's office was deemed forfeitable because it was the situs from which controlled substances were dispensed and distributed in violation of the Drug Control Act.¹⁰²

The United States Court of Appeals for the Eighth Circuit has also adopted the "substantial connection" test to find property forfeitable under § 881(a)(7).¹⁰³ In *United States v. 3639-2nd Street, N.E.*,¹⁰⁴ the Eighth Circuit concluded that a home was subject to forfeiture under § 881(a)(7) due to its availability for illegal drug activity and the presence of drug paraphernalia, both of which facilitated the sale of cocaine

98. *Id.* at 472. The First Circuit adopted the "substantial connection" test to determine whether real property was subject to forfeiture pursuant to the language of § 881(a)(7). *Id.* Forfeiture under this test required that the government demonstrate that the property played an instrumental role in facilitating the violation of the Drug Control Act. *Id.* The First Circuit found that the test had been satisfied by affidavits alleging that there was a substantial amount of cocaine on the premises, along with other drug paraphernalia and a large sum of cash. *Id.* Thus, the First Circuit concluded that a "substantial connection" existed between the real property and illegal drug activity so as to render the property forfeitable under § 881(a)(7). *Id.*

99. 895 F.2d 987 (4th Cir. 1990).

100. *Id.* at 990. For a further discussion of the "substantial connection" test, see *supra* note 98.

101. *Id.* at 991. In *Schifferli*, the Fourth Circuit concluded that the subject property was forfeitable under § 881(a)(7) because it had been used to facilitate a violation of the Drug Control Act. *Id.* The court interpreted the term "facilitate" to mean "that the property need only make the prohibited conduct 'less difficult or more or less free from obstruction or hindrance.'" *Id.* at 990 (quoting *United States v. 3639-2nd St., N.E.*, 869 F.2d 1093, 1096 (8th Cir. 1989)). In *Schifferli*, a dentist illegally dispensed and distributed controlled substances to eight individuals from the subject property over a period of four months. *Id.* at 991. The Fourth Circuit found that the dentist's office played an instrumental role in the violation because it "was actually used in the course of his crimes" and "it provided an air of legitimacy and protection from outside scrutiny." *Id.* Thus, the property was held forfeitable under § 881(a)(7). *Id.*

102. *Id.* at 990.

103. See *United States v. 3639-2nd St., N.E.*, 869 F.2d 1093 (8th Cir. 1989). In *3639-2nd Street*, the Eighth Circuit held that the use of real property to actually commit and facilitate the sale of cocaine sufficed to render a "substantial connection" between the property and the illegal activity. *Id.* at 1097. In its analysis, the Eighth Circuit reasoned that the availability of the home as a situs for illegal drug activity coupled with the presence of drug paraphernalia on the premises established a sufficient nexus between the property and the illegal drug use to justify forfeiture under § 881(a)(7). *Id.* at 1096-97.

104. 869 F.2d 1093, 1097-98 (8th Cir. 1989).

on the premises.¹⁰⁵

Other courts have construed the term "facilitate" more broadly. In *United States v. 916 Douglas Avenue*,¹⁰⁶ the United States Court of Appeals for the Seventh Circuit held that a "substantial connection" between the real property and the illegal drug activity is *not* required to render the property forfeitable.¹⁰⁷ Instead, the Seventh Circuit found that the government need merely "demonstrate that the nexus is more than incidental or fortuitous."¹⁰⁸ In its analysis, the Seventh Circuit relied upon the plain language of the statute which provides that property is subject to forfeiture when it "is used in any manner or part to commit or to facilitate the commission of a drug related offense."¹⁰⁹ In support of its conclusion, the Seventh Circuit noted that a broad interpretation of the statute was consistent with the overall purpose of the Drug Control Act, which seeks to eradicate illicit drug activity and trade in the United States.¹¹⁰ Consequently, the Seventh Circuit found that the underlying transaction between the federal agent and the claimant, which occurred on the claimant's property, was more than incidental or fortuitous.¹¹¹ The Seventh Circuit acknowledged the harsh nature of the penalty of forfeiture, but concluded that it was justified by the language and purpose of the statute.¹¹²

3. *How Does an Innocent Owner Defend His or Her Property?*

In addition to the uncertainty surrounding the term "facilitate," there is also uncertainty associated with the innocent owner defense in § 881(a)(7).¹¹³ The statute protects an innocent owner's property from forfeiture if the innocent owner establishes, by a preponderance of the evidence, that the subject property was not used to facilitate an illegal drug transaction, or that the subject property was used "without the

105. *Id.* at 1097-98.

106. 903 F.2d 490 (7th Cir. 1990), *cert. denied sub nom. Born v. United States*, 111 S. Ct. 1090 (1991).

107. *Id.* at 494.

108. *Id.*

109. *Id.* In the Seventh Circuit, the government need only demonstrate a nexus, rather than a substantial connection, between the property and the illegal drug activity. *Id.*

110. *916 Douglas Ave.*, 903 F.2d at 493. The Seventh Circuit concluded that grafting the requirement of a substantial connection between the subject property and the illegal activity unnecessarily frustrated the congressional scheme. *Id.* The Seventh Circuit emphasized that the purpose of § 881 was to provide drug enforcement officials with a powerful weapon to eradicate illegal drug activity in the United States. *Id.* Thus, any unnecessary judicial restriction on interpretation of the statutory language would defeat the goal underlying the Drug Control Act. *Id.*

111. *Id.* at 494.

112. *Id.* at 494-95.

113. For the text of the innocent owner defense of § 881(a)(7), see *supra* note 12.

knowledge or consent of that owner.”¹¹⁴ Some courts have held that an innocent owner must establish both a lack of knowledge and a lack of consent before the innocent owner defense can be employed to avoid forfeiture under § 881(a)(7).¹¹⁵ Other courts, however, have held that a claimant may rely on the defense of innocent ownership by establishing either lack of knowledge or lack of consent to the prohibited activity.¹¹⁶

In *United States v. Lot 111-B*,¹¹⁷ the United States Court of Appeals for the Ninth Circuit held that the innocent owner defense is only available to those owners who prove both lack of knowledge and lack of consent.¹¹⁸ The Ninth Circuit based its decision upon an interpretation of the policy and legislative history of the Drug Control Act.¹¹⁹

114. 21 U.S.C. § 881(a)(7) (1988); *see also* Landman & Hieronymus, *supra* note 1, at 180.

115. *See* *United States v. Lot 111-B*, 902 F.2d 1443, 1445 (9th Cir. 1990) (per curiam) (“The intent of the forfeiture provision is to seize all property that has a ‘substantial connection’ to the illegal drug activity. This policy would be substantially undercut if persons . . . fully aware of the illegal connection or source of their property were permitted to reclaim the property as ‘innocent owners.’”); *see also* *United States v. Certain Real Property*, 724 F. Supp. 908, 916 (S.D. Fla. 1989). In *Certain Real Property*, the district court stated: “It is enough, under the statute, that the owner establish that the proscribed act was committed ‘without the knowledge or consent of that owner.’” *Id.* at 916. The *Certain Real Property* court further held that the statute does not require the claimants to demonstrate that they did all they could to prevent the prohibited use of the property to rely on the innocent owner defense. *Id.* Rather, the “claimant must establish that he did not know of, nor consent to, the proscribed use of defendant property.” *Id.* at 914.

116. *See* *United States v. 141st St. Corp.*, 911 F.2d 870, 877 (2d Cir. 1990) (noting that although language of § 881(a)(7) is “confusing,” definition of “consent” mandates interpretation that innocent ownership can be established by either lack of knowledge or lack of consent), *cert. denied*, 111 S. Ct. 1017 (1991); *see also* *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 626, *reh’g denied*, 890 F.2d 659 (3d Cir. 1989) (holding that the district court erred by concluding that the owner lost her property because she failed to prove lack of knowledge without considering whether lack of consent was present).

117. 902 F.2d 1443 (9th Cir. 1990).

118. *Id.* at 1445. In *Lot 111-B*, the Ninth Circuit ruled that the innocent owner defense was unavailable to the claimant because he was aware of illegal drug trade on the subject property. *Id.* The claimant argued that the innocent owner defense was available if he had no knowledge of the illegal activities or if he did not consent to the illegal activities. *Id.* The Ninth Circuit rejected the claimant’s interpretation and affirmed the lower court decision which held that the innocent owner defense was available only to those owners proving *both* lack of knowledge and lack of consent. *Id.*; *see also* 6109 Grubb Rd., 886 F.2d at 626.

119. *Lot 111-B*, 902 F.2d at 1445. The Ninth Circuit noted that the legislative history of § 881(a)(7) does not provide much guidance on the issue. *Id.* The Ninth Circuit, however, reviewed the legislative history of § 881(a)(6), which explained language identical to that in § 881(a)(7). *Id.* The legislative history of § 881(a)(6) indicated that Congress intended that the innocent owner defense be available only to those property owners who could prove both lack of knowledge and lack of consent to the illicit use of the property. *Id.*

The congressional joint committee report provides in pertinent part: “Specifically the property would not be subject to forfeiture unless the owner of such

In contrast, the Second Circuit has held that a property owner may avoid forfeiture by proving either lack of knowledge or lack of consent to the prohibited use of the property.¹²⁰ In *United States v. 141st Street Corp.*,¹²¹ the Second Circuit recognized that the language of the statute provides for two alternative interpretations.¹²² First, the court noted that the use of the disjunctive "or" indicates that a claimant can successfully assert the defense of innocent ownership by proving either lack of knowledge or lack of consent.¹²³ Second, the Second Circuit noted that the placement of the preposition "without" before the phrase "knowledge or consent" suggests that the defense is available only to those owners who can prove both lack of knowledge and lack of consent.¹²⁴

The Second Circuit adopted the first interpretation, which requires that owners asserting the defense prove either lack of knowledge or lack of consent.¹²⁵ The Second Circuit based its decision upon the fact that Congress included the innocent ownership defense to preclude the unjust punishment of innocent owners by the imposition of the penalty of forfeiture.¹²⁶ Despite this conclusion, the Second Circuit stated that a

property knew or consented to the [illegal conduct]." Joint House-Senate Explanation of Senate Amendment, 124 CONG. REC. 34670, 34672 (1978).

Thus, the Ninth Circuit reasoned that a logical reading of the statutory language of § 881(a)(7) would make the innocent owner defense available only to those parties who could prove both lack of knowledge and lack of consent. *Lot 111-B*, 902 F.2d at 1445.

120. See *141st St. Corp.*, 911 F.2d at 878; see also *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396, 398 (3d Cir. 1990) (holding that innocent owner defense available to claimants who prove either lack of knowledge or lack of consent to illicit drug activity); *6109 Grubb Road*, 886 F.2d at 626 (finding that claimant can demonstrate innocent ownership by showing, by a preponderance of evidence, that illegal use of property occurred either without claimant's knowledge or without claimant's consent).

121. 911 F.2d 870 (2d Cir.), cert. denied, 111 S. Ct. 1017 (1990).

122. *Id.* at 878.

123. *Id.*

124. *Id.*

125. *Id.* The Second Circuit reasoned that the definition of the word "consent" implies that one must have knowledge before consent can be given. *Id.* Thus, the Second Circuit concluded that if "a claimant's knowledge alone precludes the innocent owner defense (i.e., that a claimant must disprove both knowledge and consent), then 'consent' as used in the statute would be totally unnecessary." *Id.*

126. *Id.*; see also Jankowski, Note, *supra* note 13, at 175 (noting congressional concern with impact of seizure provisions on innocent parties). In enacting § 881(a)(7), Congress included the innocent owner defense to circumvent the harsh effects of civil in rem forfeiture. *Id.* Although § 881(a)(7) includes the defense for innocent owners, the relation-back provision in § 881(h) does not include an analogous defense. *Id.* at 175-77. This inconsistency can lead to harsh results for the innocent owner despite the protection in § 881(a)(7). *Id.* Under § 881(h), a subsequent purchaser of property is not afforded any protection because the property is considered forfeited to the government at the moment of the wrongdoing. *Id.* at 176-77. Thus, a subsequent purchaser cannot rely on § 881(a)(7) because § 881(h) states that title vests in the government upon a violation of the Drug Control Act. *Id.* at 177. The inconsistency between

property owner, relying on a lack of consent to prove innocent ownership, must demonstrate that he or she "did all that reasonably could be expected to prevent the illegal activity once he [or she] learned of it."¹²⁷ In its holding, the Second Circuit concluded that the property in *141st Street Corp.* was subject to forfeiture because the owner failed to take reasonable steps to prevent the drug trafficking that occurred both in the common areas of the building and in one-third of all the apartments in the building.¹²⁸

4. *Seizure of Forfeited Property Under Section 881(b)*

Once the government establishes that the property is subject to for-

§ 881(a)(7) and § 881(h) has the potential to lead to inequitable results for property purchasers depending upon when the property is purchased. *See id.* For example, "[t]he purchaser who buys the day before [the wrongdoing] is fully protected, while the subsequent purchaser has absolutely no protection." *Id.* Thus, the relation-back provision in § 881(h) lends uncertainty to the domain of property law. *Id.* "Even the most diligent purchaser [cannot] fully protect himself because no records would indicate prior illegal activity." *Id.* Therefore, an innocent purchaser of property would have no relief from a forfeiture demand by the government which was based on an illegal use prior to the purchase. *Id.* This results because the property retains the taint of illegal use despite the sale to an innocent purchaser. *See id.*

127. *141st St. Corp.*, 911 F.2d at 879. The Second Circuit based its decision on the holding in *Calero-Toledo* which provided that forfeiture of an innocent owner's property might be unconstitutional if the owner had taken action to prevent the illegal use of the property upon learning of it. *Id.* Although the courts are split on the issue of whether to incorporate the *Calero-Toledo* standard into § 881(a)(7), the Second Circuit adopted it. *See id.* *But cf.* *United States v. Certain Real Property*, 724 F. Supp. 908, 914 (S.D. Fla. 1989) (rejecting application of third prong of *Calero-Toledo* test to innocent owner defense in § 881(a)(7) and distinguishing Puerto Rican statute in *Calero-Toledo* because it did not include innocent owner defense). The Second Circuit concluded that the *Calero-Toledo* standard applied to § 881(a)(7) because "it provides a balance between the two congressional purposes of making drug trafficking prohibitively expensive for the property owner and preserving the property of an innocent owner." *141st St. Corp.*, 911 F.2d at 879.

128. *141st St. Corp.*, 911 F.2d at 881. In reaching its conclusion, the Second Circuit relied on *Calero-Toledo*, noting that courts adopting this standard do so on the premise that Congress intended to incorporate the *Calero-Toledo* standard into § 881(a)(7). *Id.* at 879.

By comparison, courts that reject this standard argue that Congress would have expressly incorporated it into the statutory language of § 881(a)(7) if that were the congressional intent. *Id.* Furthermore, courts rejecting this line of reasoning argue that the statute in question in *Calero-Toledo* did not include an innocent owner defense. *See United States v. Four Million, Two Hundred Fifty-Five Thousand Dollars*, 762 F.2d 895, 906 n.24 (11th Cir. 1985) (leaving for another time the applicability of *Calero-Toledo* dicta to forfeiture actions under § 881(a)(6)), *cert denied*, 474 U.S. 1056 (1986); *see also* Jankowski, Note, *supra* note 13, at 190-91 (noting that absence of innocent defense in Puerto Rican statute diminished usefulness of *Calero-Toledo* in § 881 cases). Thus, the Second Circuit concluded that "defining 'consent' in section 881(a)(7), as the failure to take all reasonable steps to prevent illicit use of premises once one acquires knowledge of the use is entirely appropriate." *141st St. Corp.*, 911 F.2d at 879.

feiture, and the property owner fails to prove that the property was not used to facilitate an illegal drug transaction or fails to establish innocent ownership, the government must utilize forfeiture mechanisms in § 881(b) of the Drug Control Act to effect the seizure of the property used to facilitate the prohibited activity.¹²⁹

Section 881(b) authorizes the commencement of forfeiture proceedings in one of two ways.¹³⁰ First, when the government lacks probable cause to believe that the property was used in violation of the Drug Control Act, forfeiture may be commenced by the Attorney General pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims (Admiralty and Maritime Rules).¹³¹ The Admiralty and Maritime Rules allow the seizure of property upon the filing of a verified

129. 21 U.S.C. § 881(b) (1988). Section 881(b) provides:

Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

- (1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;
- (2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;
- (3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or
- (4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

Id.

130. *See id.* Sections 881(b)(1) and (2) authorize the government to commence forfeiture proceedings under the Supplemental Rules for Certain Admiralty and Maritime Claims. *Id.* Sections 881(b)(3) and (4) provide that forfeiture should be effected under the United States Customs law on forfeiture which is incorporated in § 881(d). *See generally id.* § 881(b), (d).

131. If forfeiture commences under the Admiralty and Maritime Rules, the rules provide that a verified complaint be filed. FED. R. CIV. P. SUPP. RULES (C)(2). The verified complaint and any supporting documentation must then be reviewed by the district court where the property is located to determine whether probable cause exists for in rem forfeiture. FED. R. CIV. P. SUPP. RULES (C)(2)-(3). If probable cause exists, the clerk of the court is authorized to issue a warrant for service by the Marshal. FED. R. CIV. P. SUPP. RULES (C)(3). An exception to the pre-seizure hearing requirement arises when the United States seeks forfeiture for federal statutory violations. *Id.* Under such circumstances, the clerk of the court is authorized to issue a summons and warrant for seizure upon the filing of a verified complaint. *Id.*

complaint and a warrant of arrest in rem.¹³² Second, when probable cause exists to believe that the property has been used to facilitate a violation of the Drug Control Act, the Attorney General may seize property.¹³³ Such seizure is effected through proceedings set out in § 881(d), which incorporates the United States Customs forfeiture law (Customs Law).¹³⁴

Whether the Attorney General proceeds under the Admiralty and Maritime Rules or the Customs forfeiture law to effect the seizure of real property, the Constitution requires, at a minimum, an *ex parte* pre-seizure hearing to ensure that the government has not used unreasonable or unconstitutional means to seize the real property.¹³⁵ An exception to this rule has been judicially recognized when exigent circumstances exist.¹³⁶ The exception allows for seizure prior to a judicial hearing when there is danger that the "res" may disappear.¹³⁷ However, "[w]here the property is large and immovable (e.g., land and buildings thereon), and the likelihood of it being concealed or destroyed is remote, there is no overriding need for 'prompt action' which would sacrifice the property owner's rights to procedural due process."¹³⁸

132. FED. R. CIV. P. SUPP. RULES (C)(3).

133. See 21 U.S.C. § 881(b)(4); see also *United States v. 124 East North Ave.*, 651 F. Supp. 1350, 1353 (N.D. Ill. 1987) (indicating that two paths are available for securing a warrant for seizure of property used to facilitate violation of Drug Control Act—Admiralty and Maritime Rule C or § 881(b)(4), which incorporates the U.S. Customs laws).

134. See 21 U.S.C. § 881(d). Section 881(d) provides in pertinent part: [E]xcept that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

Id.

135. See *124 East North Ave.*, 651 F. Supp. at 1353. The *124 East North Avenue* court noted that a pre-seizure judicial hearing is not "required and is expressly exempted under Admiralty and Maritime Rule (C)(3)" and under 21 U.S.C. § 881(b). *Id.* Nonetheless, the *124 East North Avenue* court recognized that an exception to this rule exists when the government seizes real property. *Id.* at 1356.

136. *Id.* at 1355. The *124 East North Avenue* court recognized that in some instances exigent circumstances might exist and would preclude a pre-seizure judicial hearing. *Id.* Such a hearing would "frustrate the interests served by the statute," and would defeat government efforts to eradicate illegal drug trafficking. *Id.* The *124 East North Avenue* court noted, however, that exigent circumstances do not typically exist when the subject property is real estate since there is little or "no likelihood of [real estate] being concealed or destroyed." *Id.*

137. See *Fuentes v. Shevin*, 407 U.S. 67 (1972) (noting that in some cases the danger that goods would disappear or be destroyed would be sufficient to justify seizure of goods without notice and opportunity to be heard).

138. *124 East North Ave.*, 651 F. Supp. at 1355 (quoting *United States v. 4880 S.E. Dixie Highway*, 612 F. Supp. 1492, 1496 (S.D. Fla. 1985)). In *United States v. 4880 S.E. Dixie Highway*, the district court held that the "Fifth Amend-

Thus, the case law provides that no seizure of real property should commence unless a warrant is issued by a judicial officer who has reviewed the complaint to determine whether probable cause exists to require forfeiture of the property.¹³⁹

ment forbids the Attorney General from seizing real property under the drug forfeiture statute and the Supplemental Rules for Certain Admiralty and Maritime Claims, absent exigent circumstances, without prior judicial review." *United States v. 4880 S.E. Dixie Highway*, 612 F. Supp. 1492, 1498 (S.D. Fla. 1985).

In *4880 S.E. Dixie Highway*, the United States Department of Justice initiated forfeiture proceedings pursuant to a verified complaint to seize real property located in Florida. *Id.* at 1493. The *4880 S.E. Dixie Highway* court deemed the verified complaint defective because it failed to include objective facts supporting the government's claim that the property had been used in violation of the federal narcotics laws. *Id.* at 1494. The *4880 S.E. Dixie Highway* court held that the defect was of "constitutional proportions which invalidate[d] the seizure process *ab initio*." *Id.* at 1495.

In its analysis, the *4880 S.E. Dixie Highway* court relied on the Supreme Court's decisions in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and *Fuentes v. Shevin*, 407 U.S. 67 (1972). *Id.* In *Sniadach*, the Supreme Court held that a Wisconsin prejudgment garnishment law amounted to an unconstitutional taking of property in violation of the Due Process Clause of the Fourteenth Amendment. *Sniadach*, 395 U.S. at 341-42. Similarly, the *Fuentes* Court struck down Florida and Pennsylvania replevin statutes that enabled creditors to effect forfeiture without prior judicial review. *Fuentes*, 407 U.S. at 96. The *Fuentes* Court also noted, however, that exigent circumstances may arise that preclude prior judicial review. *Id.* at 90-91. To determine the constitutionality of seizure, the *Fuentes* Court articulated a three-prong test. The test questions: (1) whether seizure is necessary to protect "an important government interest or general public interest"; (2) "whether a special need for prompt action exists"; and (3) "whether the government has used reasonable force to effect the seizure." *Id.* at 91.

Applying the *Fuentes* logic to the facts of the case before it, the *4880 S.E. Dixie Highway* court determined that seizure was unconstitutional because no exigent circumstances existed. *4880 S.E. Dixie Highway*, 612 F. Supp. at 1498. The *4880 S.E. Dixie Highway* court noted that it was extremely unlikely that the real property in question would disappear. *Id.* at 1496; *cf.* *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974) (holding seizure of yacht without prior judicial review constitutional, in part, because yacht could be removed from jurisdiction).

139. *124 East North Ave.*, 651 F. Supp. at 1356. In *124 East North Avenue*, the court reviewed the procedure by which forfeiture proceedings were commenced under §§ 881(a)(7) and (b)(4) to seize a home allegedly used in violation of federal narcotics laws. *Id.* at 1352-53. The property owner contended that the procedures instituted by the government violated the Fifth Amendment because there was no pre-seizure notice of hearing. *Id.* at 1354. Although § 881(b)(4) enables the Attorney General to commence forfeiture proceedings upon showing of probable cause, this authority is subject to further scrutiny when real property is seized. *Id.* at 1353. At a minimum, the *124 East North Avenue* court held that the Due Process Clause of the Fifth Amendment requires pre-seizure judicial review before real property is seized, absent exigent circumstances. *Id.* at 1356. Thus, the *124 East North Avenue* court granted the property owner's motion to quash the warrant for seizure. *Id.* However, the *124 East North Avenue* court further ordered that the clerk reissue the in rem arrest warrant for the property because probable cause to seize the property existed in the government's complaint. *Id.*

The procedures outlined above describe the formal process of transferring the forfeited property to the government. In actuality, the relation-back doctrine, codified in § 881(h) of the Drug Control Act, provides that the property involved in the illegal act is subject to forfeiture immediately upon the commission of the act.¹⁴⁰ At the moment the property is involved in the illegal drug activity, “[a]ll right, title, and interest in the [forfeitable] property . . . shall vest in the United States.”¹⁴¹ The purpose of this provision is to preclude the transfer of forfeitable property via transactions that “were not conducted at arm’s length.”¹⁴² Section 881(h), however, does not include an innocent owner defense.¹⁴³ Thus, the section prohibits subsequent transfers of the forfeitable property which are undertaken to escape the reach of the government’s valid in rem proceedings, but it fails to protect transactions undertaken at arm’s length with an innocent subsequent purchaser.¹⁴⁴

III. ANALYSIS

A. *The Conflicts Between Civil Forfeiture Law and State Marital Property Law*

The application of the legal fiction of in rem forfeiture incorporated into § 881 gives rise to uncertainty when the doctrine is applied to real property located in a jurisdiction that recognizes tenancy by the entirety as a form of property ownership.¹⁴⁵ In cases where the government commences in rem forfeiture proceedings against real property owned by husband and wife as tenants by the entirety, there is no uniform rule of law governing the subsequent disposition of such property when one of the spouses is an innocent owner.¹⁴⁶ The following overview of the current case law will provide the reader with some insight as to the logic applied by the courts when faced with the task of reconciling the forfeiture of real property under § 881 and state marital property law.

In some jurisdictions, courts have held that no portion of the subject property is forfeitable as long as the tenancy by the entirety remains intact.¹⁴⁷ In contrast, other courts have held that the entireties estate is

140. 21 U.S.C. § 881(h) (1988). For the text of the relation-back doctrine codified in § 881(h), see *supra* note 78.

141. 21 U.S.C. § 881(h).

142. Landman & Hieronymus, *supra* note 1, at 176.

143. See 21 U.S.C. § 881(h). Thus, innocent owners may have to forfeit property to the government pursuant to § 881(h) despite the defense incorporated in § 881(a)(7). See Jankowski, Note, *supra* note 13, at 175-77. For a further discussion of the inconsistencies between § 881(h) and § 881(a)(7), see *supra* note 126.

144. See Landman & Hieronymus, *supra* note 1, at 174.

145. See *id.* at 180; see also Valukas & Walsh, *supra* note 79, at 36.

146. See Landman & Hieronymus, *supra* note 1, at 180.

147. See, e.g., *United States v. 15621 S.W. 209th Ave.*, 894 F.2d 1511, 1512

severable upon a violation of the Drug Control Act.¹⁴⁸ In the latter jurisdictions, the government is entitled to the property interest of the spouse who allegedly used the property in violation of federal narcotics laws.¹⁴⁹ A third judicial approach allows the innocent spouse to retain the property during the course of his or her life, with the property forfeited to the government upon the innocent spouse's death.¹⁵⁰

Recently, the United States Courts of Appeals for the Eleventh, Sixth and Third Circuits have considered the conflict that arises through the application of the civil forfeiture provisions of § 881(a)(7) to real property owned by spouses as tenants by the entirety when one spouse is an innocent owner. There is a split among these circuits as to how this conflict should be resolved because neither the statutory language of § 881(a)(7) nor its legislative history provides any guidance.¹⁵¹

(11th Cir. 1990). The Eleventh Circuit held that no property held by husband and wife as tenants by the entirety could be forfeited under § 881(a)(7) as long as the tenancy by the entirety remained intact. *Id.* at 1512. In *15621 S.W. 209th Avenue*, the husband was convicted of drug trafficking and the government filed a forfeiture proceeding against the entireties property. *Id.* The court noted that "reading subsection (h) of section 881 in tandem with subsection (a), it becomes clear that the 'right, title and interest' . . . vests in the United States upon commission of the unlawful act." *Id.* at 1516. The court, however, concluded that the government could not seize the property because such seizure would result in a taking of the wife's property without just compensation. *Id.* The court reasoned that Congress could not have intended to penalize the wife for her husband's wrongdoing when enacting § 881(a)(7), and thus found that the wife retained an undivided interest in the whole property that could not be forfeited. *Id.*; see also *United States v. 11885 S.W. 46th St.*, 751 F. Supp. 1538, 1540 (S.D. Fla. 1990) (holding that property held by husband and wife as tenants by the entirety not subject to forfeiture where innocent spouse had no knowledge of and did not consent to illegal use); cf. *United States v. 2525 Leroy Lane*, 910 F.2d 343, 351 (6th Cir. 1990) (disapproving of *United States v. One Parcel of Real Estate* at 11885 S.W. 46th St., 715 F. Supp. 355, 360 (S.D. Fla. 1989), and holding innocent spouse retains her interest in entireties estate while entireties intact but government acquires lien on guilty spouse's interest to be satisfied upon severance of entireties estate), *cert. denied sub nom. Marks v. United States*, 111 S. Ct. 1414 (1991).

148. See, e.g., *United States v. One Parcel of Real Estate* at 11885 S.W. 46th St., 715 F. Supp. 355, 360 (S.D. Fla. 1989). In *One Parcel of Real Estate*, the court applied § 881(h) in conjunction with § 881(a)(7) to conclude that a violation of the Drug Control Act converted the tenancy by the entirety into a tenancy in common, resulting in the government and the wife each owning a one-half share of the property. *Id.* at 360. Under § 881(h), the court found that the tenancy by the entirety was destroyed at the moment of the wrongdoing. *Id.* However, because the drug dealer's wife satisfied her burden of proof under the innocent owner defense in § 881(a)(7), the court found that the government assumed the ownership interest formerly held by the husband, and the government and the wife became co-tenants. *Id.* Each was "deemed to have a one-half interest in the property." *Id.* at 358.

149. *Id.* at 359-60.

150. See *United States v. 1500 Lincoln Ave.*, 949 F.2d 73, 77-78 (3d Cir. 1991).

151. *Id.* at 76 (noting that "the statutory language does not clearly reveal what, if any, interest . . . is susceptible to forfeiture").

The Eleventh Circuit has recently held that none of the property held as tenants by the entirety can be subject to forfeiture because an innocent spouse owns an indivisible interest in the entire estate.¹⁵² By way of comparison, the Sixth Circuit held that an innocent spouse retains her interest in the entireties estate so long as the estate remains intact.¹⁵³ The government, however, assumes the position of a judgment creditor entitled to the guilty spouse's interest in the property upon severance of the estate.¹⁵⁴ In contrast, the Third Circuit recently determined that the guilty spouse immediately forfeits any interest in the subject property to the government while the innocent spouse retains "full and exclusive use and possession of the property . . . [for] life."¹⁵⁵

None of these circuit court decisions provides a satisfactory resolution of the conflict. In jurisdictions following the Eleventh Circuit's rationale, the government would be entitled to no portion of the estate—a resolution in direct contravention of the policy of the Drug Control Act. The Sixth Circuit's decision is equally flawed because it essentially places the determination of the interests of the innocent spouse and the government on hold for the duration of the entireties estate. In an attempt to remedy the inadequacies of the decisions made by the Eleventh Circuit and the Sixth Circuit, the Third Circuit also failed to provide a satisfactory resolution of the conflict that arises between the statutory language of § 881(a)(7) and state marital property laws.¹⁵⁶ The Third Circuit simply avoided the issue by adopting the government's recommendation for immediate forfeiture of the guilty spouse's interest in the entireties property, while retaining full and exclusive use of the property for the life of the innocent spouse.¹⁵⁷

B. *An Innocent Spouse's Marital Property May Survive Forfeiture Proceedings*

The Eleventh Circuit recently articulated its rationale in *United States v. 15621 S.W. 209th Avenue*.¹⁵⁸ In *15621 S.W. 209th Avenue*, the Eleventh Circuit held that no portion of real property owned by husband and wife as tenants by the entirety could be forfeited to the government under the Drug Control Act when the innocent owner defense of subsection 881(a)(7) applied to either of the spouses.¹⁵⁹ In arriving at this conclu-

152. *United States v. 15621 S.W. 209th Ave.*, 894 F.2d 1511, 1512 (11th Cir. 1990).

153. *United States v. 2525 Leroy Lane*, 910 F.2d 343, 351 (6th Cir. 1990), *cert. denied sub nom. Marks v. United States*, 111 S. Ct. 1414 (1991).

154. *Id.* at 350.

155. *1500 Lincoln Ave.*, 949 F.2d at 78.

156. *See id.*

157. *Id.* at 77.

158. 894 F.2d 1511 (11th Cir. 1990).

159. *Id.* at 1512. In *15621 S.W. 209th Avenue*, the government sought the in rem forfeiture of real property located in Florida and owned by Carlomilton and Ibel Aguilera, husband and wife, as tenants by the entirety. *Id.* The government

sion, the Eleventh Circuit applied the substantive law of Florida to determine what ownership interest could be retained by the wife as an innocent owner.¹⁶⁰ Under Florida common law, spouses can hold property as tenants by the entirety provided that the five unities exist—marriage, title, time, interest and control.¹⁶¹ As long as the five unities are present, the entireties estate continues and cannot be severed by the unilateral action of one spouse.¹⁶² The Eleventh Circuit determined that the wife's ownership interest in *15621 S.W. 209th Avenue* was that of a tenant by the entirety.¹⁶³ Specifically, the Eleventh Circuit found that the wife held an "indivisible right to own and occupy the entire property otherwise subject to forfeiture."¹⁶⁴ Thus, the Eleventh Circuit concluded that no portion of the property could be forfeited since the wife's "interest encompass[ed] all 'right, title and interest' in the property as all three are indivisible between a husband and wife holding property by the entireties."¹⁶⁵

In its analysis, the Eleventh Circuit interpreted the civil forfeiture provision of § 881(a)(7) and the relation-back doctrine codified in

commenced a forfeiture proceeding under § 881(a)(7) after Mr. Aguilera conducted an illegal sale of cocaine to an undercover drug enforcement officer on the premises. *Id.* Although Mr. Aguilera was subsequently convicted for cocaine trafficking, Mrs. Aguilera successfully established the defense of innocent ownership by proving that she did not know of or consent to the illegal drug activity on the property. *Id.* at 1513. Consequently, Mrs. Aguilera was entitled to retain her entire interest in the subject property. *Id.*

160. *Id.* at 1514. The Eleventh Circuit affirmed the district court's decision, which held that an innocent owner under § 881(a)(7), Mr. Aguilera was entitled to retain her indivisible interest in the entire property. *Id.* at 1520. The Eleventh Circuit found that Florida state property law had been properly applied to determine what portion of the entireties estate could be forfeited to the government as a result of Mr. Aguilera's criminal activity. *Id.* at 1514. The court held that no portion of the estate was forfeitable because it "would penalize Mrs. Aguilera for the wrongdoing of her husband, in which she neither participated nor had knowledge." *Id.* at 1516.

161. *Id.* at 1514 (citing *Andrews v. Andrews*, 21 So. 2d 205, 206 (Fla. 1945)); see also *Bechtel v. Estate of Bechtel*, 330 So. 2d 217, 219 (Fla. Dist. Ct. App. 1976), *cert. denied sub nom.* *Mears v. Bechtel*, 360 So. 2d 1249 (Fla. 1978).

162. *15621 S.W. 209th Ave.*, 894 F.2d at 1515. The Eleventh Circuit noted that an entireties estate can be severed in any of a variety of ways under Florida law: (1) death of one of the spouses; (2) divorce or dissolution of the marriage; (3) reconveyance by the spouses to themselves as tenants in common; (4) murder of one spouse by another; (5) transfer by one spouse to the other in fee simple; or (6) an instrument creating the entireties estate as limited in time. *Id.* at 1514 n.2 (citations omitted).

163. *Id.* at 1515. Under Florida property law, the state cannot cause the forfeiture of entireties property based on the unlawful conduct of one spouse. *Id.* at 1516. Similarly, the Eleventh Circuit noted that Mrs. Aguilera retained her indivisible interest in the subject property because she had satisfied her burden under the innocent owner defense in § 881(a)(7). *Id.*

164. *Id.* at 1515.

165. *Id.* at 1516. The Eleventh Circuit stated that any forfeiture would be an unconstitutional taking without due process or just compensation. *Id.*

§ 881(h).¹⁶⁶ The Eleventh Circuit's interpretation provided that property becomes subject to forfeiture upon a violation of the federal narcotics law.¹⁶⁷ However, the Eleventh Circuit noted that the language of § 881(a)(7) only entitles the government to obtain that portion of the subject property that remains after the innocent owner's interest has been set aside.¹⁶⁸ Thus, the *15621 S.W. 209th Avenue* court determined that nothing could be forfeited to the government because the wife owned an indivisible interest in the entire property.¹⁶⁹

In reaching this conclusion, the Eleventh Circuit soundly rejected the government's contention that the innocent owner's interest is determined after the government effects forfeiture.¹⁷⁰ The Eleventh Circuit reasoned that subjecting any portion of the property to forfeiture would not only offend the statutory scheme, but would also frustrate the congressional intent underlying the statute—the imposition of a penalty upon those involved in drug trafficking.¹⁷¹ The Eleventh Circuit further noted that the inclusion of the innocent owner defense in § 881(a)(7) supports the proposition that Congress sought to protect innocent owners from the harsh penalty of forfeiture.¹⁷²

In *15621 S.W. 209th Avenue*, the Eleventh Circuit also rejected the government's argument that a rule of federal common law should be created to determine property rights under the Drug Control Act.¹⁷³

166. *Id.*

167. *Id.*

168. *Id.* The Eleventh Circuit first noted that the objective of the forfeiture statutes is the imposition of a penalty upon wrongdoers. *Id.* In order to protect innocents from unjust forfeiture, Congress included an innocent owner defense in § 881(a)(7). *Id.* The Eleventh Circuit then concluded that a reading of § 881(a)(7) in tandem with § 881(h) yielded the result that the government was entitled to "whatever interest remain [ed] in the property after the innocent owner's interest had been excepted." *Id.*

169. *Id.* In a footnote, the court discussed "the possibility that if the [government] filed a *lis pendens* against the property, the government might acquire in a later forfeiture proceeding Mr. Aguilera's interest in the property" should the couple's interests become separate due to divorce, death or some other action. *Id.* at 1516 n.6. Thus, the court reasoned that the government would not be precluded from attempting to execute on its interest if the entireties estate was subsequently changed. *Id.* The "[p]urpose of '*lis pendens*' is to notify perspective purchasers and encumbrancers that any interest acquired by them in property in litigation is subject to decision of court and while it is simply a notice of pending litigation the effect thereof on the owner of property is constraining." BLACK'S LAW DICTIONARY 932 (6th ed. 1990).

170. *15621 S.W. 209th Ave.*, 894 F.2d at 1516.

171. *Id.*

172. *Id.*

173. *Id.* at 1517. The government argued that the district court erred in applying state law to determine its property interest and that of Mrs. Aguilera because Florida property law that prohibited forfeiture of a one-half interest in the property conflicted directly with the federal forfeiture law. *Id.* The government advocated the development of federal common law to resolve the issue. *Id.*

The government contended that federal law should preempt state property law because the application of state property law defeated the purpose of the civil forfeiture provisions of the Drug Control Act.¹⁷⁴ The government advocated "a uniform federal rule of decision that 'the United States is entitled to forfeit a one-half interest in property owned by husband and wife where one spouse uses the property for narcotics trafficking.'"¹⁷⁵ The Eleventh Circuit flatly rejected the government's proposition and found that the district court "rightly used Florida state law in determining the property interests."¹⁷⁶ In its analysis, the Eleventh Circuit cited a general rule of law pronounced by the Supreme Court that provides that state law will govern the determination of property rights under federal statutes except when Congress expressly provides for preemption or when compliance with both state and federal law is impossible.¹⁷⁷ Under these exceptions, federal law will preempt state law.¹⁷⁸ Applying this rule in *15621 S.W. 209th Avenue*, the Eleventh Circuit concluded that Florida law was properly applied to determine the ownership interests of the innocent spouse because Florida law did not conflict with federal law.¹⁷⁹ The Eleventh Circuit found that no con-

174. *Id.*

175. *Id.*

176. *Id.* In affirming the district court decision, the Eleventh Circuit found that state property law of Florida had been applied properly to determine the property interests of the parties in a manner consistent with the mandate of federal forfeiture law. *Id.* (noting that federal courts have discretion to determine whether state law is appropriate or whether federal common law should be created when federal statutes leave room for application of state law (citing *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973))).

177. *See id.* ("State family-property law must do 'major damage' to 'clear and substantial' federal interest before federal law will override state law." (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966))); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977) (indicating that "property ownership governed by law of several states and not general federal law"); *United States v. Bess*, 357 U.S. 51, 57-58 (1958) (applying state law to determine extent of property interest under federal tax lien statute); *United States v. Gurley*, 415 F.2d 144, 149 (5th Cir. 1969) (holding that unique nature of tenancy by entireties under Florida law precludes attachment of judgment lien thereto).

178. *See 15621 S.W. 209th Ave.*, 894 F.2d at 1517 (citing *International Paper Co. v. Ouellette*, 479 U.S. 481, 491-92 (1987)). Federal law preempts state law in certain circumstances: (1) Congress specifically provides for preemption; (2) federal regulation leaves no room for the application of state law; (3) state law governs an area of federal interest thereby creating an actual conflict; or (4) state law defeats the objectives of Congress in enacting a federal statute. *Id.* at 1518.

179. *Id.* at 1518. The court reiterated that its decision was not based solely on Florida's prohibition of the forfeiture of any interest of a spouse in entireties property when the guilty spouse had acted independently. *Id.* at 1518 n.7. Rather, the court explained that it was applying Florida law to define the interests of the owners of property while also giving effect to the two purposes of the federal law: punishment of wrongdoers and protection of innocent owners. *Id.* at 1518.

flict existed because § 881 protects an innocent landowner from forfeiture whereas state law merely defines the property rights to be protected from unjust forfeiture under § 881.¹⁸⁰

C. *Forfeiture Limited to a Creditor's Lien on Innocent Spouse's Interest in Marital Property*

The Sixth Circuit recently ruled on the same issue in *United States v. 2525 Leroy Lane*.¹⁸¹ In *2525 Leroy Lane*, the Sixth Circuit analyzed the effect of federal drug forfeiture statutes upon an innocent spouse's property interest in real property held by husband and wife as tenants by the entirety under Michigan law.¹⁸² The Sixth Circuit held that the interest in property acquired by the government is "analogous to the position occupied by a judgment creditor of one spouse under Michigan law."¹⁸³

180. *Id.* The court recognized that a conflict existed, but identified it as a "dichotomy" within the federal statute with its dual purpose. *Id.*

181. 910 F.2d 343, 350 (6th Cir. 1990), *cert. denied sub nom. Marks v. United States*, 111 S. Ct. 1414 (1991).

182. *Id.* at 347. The government appealed the district court decision, which awarded the entire proceeds received from the sale of the subject property seized under the Drug Control Act to the innocent owner. *Id.* at 344. The district court case arose out of the consolidation of criminal and civil forfeiture proceedings brought after an indictment charged Mr. Marks with several violations of federal narcotics laws. *Id.* at 344-45. The real property owned by Mr. Marks and his wife as tenants by the entirety had been seized under § 853(a)(2), the criminal forfeiture provision of the Drug Control Act. *Id.* at 345. The government also filed a civil complaint for forfeiture under § 881(a)(7) against the real property while the criminal proceedings against Mr. Marks were pending. *Id.* In response, Mrs. Marks filed a petition for a determination of her interest in the subject property in both the criminal and civil proceedings. *Id.*

While the proceedings were pending, the parties agreed to sell the subject property. *Id.* "[T]he proceeds of the sale were designated as [the] substitute res in which the parties were deemed to have the same interest as they had in the real estate." *Id.* During the the district court proceedings, the parties also stipulated that Mrs. Marks was an innocent owner under § 881(a)(7). *Id.*

183. *Id.* at 351. The district court awarded judgment in favor of Mrs. Marks as the innocent owner of the subject property. *Id.* at 344. The district court concluded that Mrs. Marks' interest in the subject res "constituted an interest in the property as a whole, and that her innocent owner status operated to avoid forfeiture as to the entire property." *Id.* at 345.

The Sixth Circuit vacated the district court decision and held that the entire property vested in Mrs. Marks as she held an indivisible interest in the whole property. *Id.* at 351. The Sixth Circuit concluded that the government could only acquire that interest in the subject property which was held by Mr. Marks as a cotenant of the entireties estate. *Id.* The court noted, however, that "the Government [could] not occupy the position of Mr. Marks in the entireties estate, since the estate is founded on marital union, and the Government obviously [could not] assume the role of spouse to Mrs. Marks." *Id.* Thus, the government was precluded from obtaining the husband's interest unless or until Mrs. Marks predeceased him, or the entireties estate terminated in some other manner. *Id.*

The Sixth Circuit found that "the interest acquired by the Government [was] most analogous to the position occupied by a judgment creditor of one

The Sixth Circuit began its analysis with a review of Michigan's property law regarding tenancy by the entirety.¹⁸⁴ Under Michigan law, a husband and wife who hold property as tenants by the entirety receive a single title over the subject property with a right of survivorship.¹⁸⁵ Thus, the Sixth Circuit reasoned that the wife, as the innocent owner of the entireties estate, held an indivisible interest in the property coupled with a right of survivorship "which would entitle her to sole ownership of the property upon her husband's death."¹⁸⁶

The Sixth Circuit next considered the role to be accorded state property laws under the federal forfeiture sections of in the Drug Control Act.¹⁸⁷ The Sixth Circuit, like the Eleventh Circuit in *15621 S.W. 209th Avenue*, rejected the government's contention that federal common law should be developed by federal courts to determine property rights of innocent owners under the statute.¹⁸⁸ Rather, the Sixth Circuit noted that the development of federal common law is inappropriate when Congress has not provided for its development and when the incorporation of state law will not frustrate the congressional intent of the forfeiture statute.¹⁸⁹ Thus, the Sixth Circuit concluded "that recogni-

spouse under Michigan law." *Id.* This determination, had the property not been sold, would have resulted in Mrs. Marks' being entitled to live in the house as long as the entireties estate continued and in the government's obtaining a lien. *Id.* Because the property was sold, the Sixth Circuit remanded the case to the district court to determine "how to manage the fund of money in such a way as will protect the Government's interest as a judgment creditor, while at the same time permitting Mrs. Marks the use of that property consistent with her interest as a tenant by the entireties." *Id.*

184. *Id.* at 346.

185. *Id.* (citing *In re Grosslight*, 757 F.2d 773 (6th Cir. 1985); *Sanford v. Bertrou*, 169 N.W. 880 (Mich. 1918)). *Id.* Under Michigan law, tenancy by the entirety is a form of property ownership unique to the marital unit. *Id.* (citing *Rogers v. Rogers*, 356 N.W.2d 228, 292-93 (Mich. Ct. App. 1989)). The law provides that "the husband and wife are but one person in the law." *Id.* Each spouse is deemed "to own the whole, and therefore, is entitled to the enjoyment of the entirety and to survivorship." *Id.* (quoting *Rogers v. Rogers*, 356 N.W.2d 228, 292-93 (Mich. Ct. App. 1989)). The Sixth Circuit also noted that Michigan law prohibits the alienation of property held in tenancy by the entirety by the unilateral act of either spouse. *Id.* (citing *Rogers v. Rogers*, 356 N.W.2d 228, 292-93 (Mich. Ct. App. 1989)). Furthermore, Michigan law prohibits creditors of one spouse from levying on the property. *Id.* (citing *In re Grosslight*, 757 F.2d 773 (6th Cir. 1985)).

186. *Id.* at 347.

187. *Id.*

188. *Id.*

189. *Id.* In concluding that the development of federal common law was unnecessary, the Sixth Circuit relied on the Supreme Court decision in *United States v. Yazell*, 382 U.S. 341 (1966). *2525 Leroy Lane*, 910 F.2d at 347. In *Yazell*, the Supreme Court considered the application of Texas property law to an action seeking judgment on a Small Business Administration loan. *Yazell*, 382 U.S. at 348-58. The Supreme Court concluded that state laws governing family property rights would only be overridden by federal courts "where clear and substantial interests of the National Government, which cannot be served consistently

tion of state laws governing property rights does not contravene the federal forfeiture scheme, and that the application of state law is the most appropriate method of determining the interest of an innocent owner."¹⁹⁰

The Sixth Circuit considered the extent to which the property held by the wife as an innocent owner could be forfeited.¹⁹¹ In addressing this issue, the Sixth Circuit looked to the language of section 881(a)(7).¹⁹² Section 881(a)(7) states that "no property shall be forfeited under this paragraph, to the extent of an interest of" an innocent owner.¹⁹³ The Sixth Circuit concluded that this language precluded forfeiture where real property was owned by an innocent owner as a tenant by the entirety.¹⁹⁴ That interest, the Sixth Circuit continued, amounted to an indivisible interest in the entire property.¹⁹⁵

with respect for such state interests, will suffer major damage if the state law is applied." *Id.* 382 U.S. at 352.

190. 2525 *Leroy Lane*, 910 F.2d at 347. The Sixth Circuit noted that, similar to forfeiture statutes, federal tax lien statutes do not define property rights. *Id.* at 348 (citing *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971)). Thus, federal courts considering the issue have used state laws governing tenancy by the entirety to determine "the interests available for the satisfaction of a federal tax lien." *Id.*

191. *Id.* at 350.

192. *Id.*

193. 21 U.S.C. § 881(a)(7) (1988). For the full text of § 881(a)(7), see *supra* note 12.

194. 2525 *Leroy Lane*, 910 F.2d at 351.

195. *Id.* at 350. The court concluded that Michigan state property law precluded the ownership interest of the government when the property was owned by an innocent owner as a tenant by the entireties. The Sixth Circuit thus rejected the government's contention that it was entitled to one-half of the property. *Id.*

To support its position, the government had relied primarily on two theories. *Id.* at 349-50. First, the government cited *United States v. Rodgers*, 461 U.S. 677 (1983), which held that homestead laws in Texas did not protect property from civil forfeiture under 26 U.S.C. § 6321, the federal tax lien statute. 2525 *Leroy Lane*, 910 F.2d at 349 (citing *Rodgers*, 461 U.S. at 692-700). In *Rodgers*, the Supreme Court concluded that the federal tax lien statute subjects the property of a delinquent taxpayer to forfeiture regardless of third party interest until the delinquent taxpayer satisfies the obligation. *Rodgers*, 461 U.S. at 694. In 2525 *Leroy Lane*, the Sixth Circuit distinguished *Rodgers* by noting that property rights under homestead laws differ from those under tenancy by the entirety. 2525 *Leroy Lane*, 910 F.2d at 349-50. The Sixth Circuit further noted that Michigan law also precluded the attachment of entireties property for satisfaction of the personal tax liability of a single spouse. *Id.* at 350.

The government also contended that the relation-back provision in § 881(h) converted the entireties estate into a tenancy in common upon a violation of the federal narcotics law. *Id.* The Sixth Circuit also rejected this argument. *Id.* But see *United States v. 11885 S.W. 46th St.*, 751 F. Supp. 1538, 1540 (S.D. Fla. 1989) (holding that government becomes co-owner of property with innocent spouse when entireties estate severed by wrongdoing). The Sixth Circuit reasoned that such forfeiture would unjustly reduce the innocent spouse's ownership interest in the entire property as defined by state law. 2525 *Leroy Lane*, 910 F.2d at 350. The Sixth Circuit concluded that the language of

Thus, the Sixth Circuit concluded that the government could obtain no greater interest in the subject property than that held by the husband prior to the initiation of the forfeiture proceedings.¹⁹⁶ This logic necessarily precludes the government from obtaining the husband's interest in the subject property unless and until the entireties estate terminates.¹⁹⁷ As a result, the Sixth Circuit found the government's position analogous to that of a judgment creditor.¹⁹⁸ As a judgment creditor, the government was entitled to attach a creditor's lien on the husband's interest in the subject property which could then be satisfied upon severance of the entireties estate.¹⁹⁹

D. *Serving Dual Goals Under § 881(a)(7)*

The Third Circuit also considered the same issue in *United States v.*

§ 881(a)(7) does not evidence a congressional intent to destroy or diminish the entireties interest of an innocent owner. *Id.* To the contrary, Congress included the innocent owner defense in § 881(a)(7) to protect the property interests of the innocent owner. *Id.*

196. 2525 *Leroy Lane*, 910 F.2d at 351. The Sixth Circuit noted that the government could not assume the ownership interest of the husband because Michigan law required that tenants by the entirety be husband and wife. *Id.* The Sixth Circuit concluded, however, that the government would be entitled to Mr. Marks' interest when and if Mrs. Marks died, or upon the severance of the entireties estate. *Id.*

197. *Id.* The Sixth Circuit specifically recognized that Michigan property law provided for the termination and conversion of the entireties estate under certain circumstances. *Id.* First, the death of one spouse triggered the right of survivorship in the remaining spouse, thereby converting the survivor's ownership interest to fee simple absolute ownership. *Id.* Second, the entireties estate became a tenancy in common by operation of law upon the spouses' divorce. *Id.*

198. *Id.* at 351. Under Michigan law, a judgment creditor of one spouse of an entireties estate has limited rights. *Id.* at 352. A judgment creditor cannot force a sale of the entireties property to satisfy one spouse's obligations. *Id.* Nor can a judgment creditor reach the "husband's share of proceeds from a foreclosure sale" of the entireties property. *Id.* However, the Sixth Circuit found that the government, as a judgment creditor, would be entitled to attach a creditor's lien upon Mr. Marks' interest that would be satisfied upon the termination of the entireties estate. *Id.* Consistent with this conclusion, the Sixth Circuit stated that Mrs. Marks would be entitled to the entire estate should Mr. Marks predecease her, while she would only be entitled to one-half of the fund should the entireties estate terminate otherwise. *Id.* Similarly, the government would only be entitled to the entire fund if Mrs. Marks predeceased Mr. Marks, and to "one half the fund upon some other termination of the estate." *Id.*

199. *Id.* at 352. The Sixth Circuit remanded the case to the district court to determine how to protect the rights of Mrs. Marks and the government during the pendency of the estate. *Id.* The parties had actually sold the property and stipulated that the proceeds from that sale would retain the same qualities as the entireties property. *See id.* at 351. Thus, on remand, the district court had to determine "how to manage the fund of money in such a way as . . . [to] protect the Government's interest as a judgment creditor, while at the same time permitting Mrs. Marks the use of the property consistent with her interest as a tenant by the entireties." *Id.*

/

1500 Lincoln Avenue.²⁰⁰ In *1500 Lincoln Avenue*, the Third Circuit held that a spouse who had satisfied the innocent owner defense in § 881(a)(7) was entitled to “full and exclusive use of the property during her life,” while allowing the government to obtain immediate forfeiture of the guilty spouse’s interest in the entireties property.²⁰¹ In an attempt to provide a solution that would best serve the dual goals of § 881(a)(7), the Third Circuit examined the statutory language of § 881(a)(7) and its accompanying legislative history.²⁰² The court also evaluated recent decisions addressing the conflict that arises between § 881(a)(7) and state marital property laws defining tenancy by the entirety.²⁰³

In an effort to reconcile the competing interests of federal forfeiture law and state marital property law, the Third Circuit analyzed the statutory language of § 881(a)(7) and the accompanying legislative history.²⁰⁴ The Third Circuit noted that the language of § 881(a)(7) provides for forfeiture of any interest in real property upon a violation of the Drug Control Act “except for the interest of an innocent owner.”²⁰⁵ The court stated that the statutory language did not address the effect of forfeiture on marital property owned by spouses as tenants by the entirety.²⁰⁶ Reviewing the legislative history, the Third Circuit concluded that the history also failed to provide the requisite guidance.²⁰⁷

By considering the opinions of both the Eleventh Circuit and the Sixth Circuit, the Third Circuit sought to adopt the solution that best served the dual goals of § 881(a)(7): “forfeiture of the property used in committing drug offenses and preservation of the property rights of in-

200. 949 F.2d 73 (3d Cir. 1991). The subject property contained a pharmacy owned by Leonard and Linda Bernstein, husband and wife, as tenants by the entirety as defined under Pennsylvania law. *Id.* at 74-75. The pharmacy was used to facilitate the illegal distribution of prescription drugs and thus was subject to forfeiture under the Drug Control Act. *Id.* The Third Circuit reversed the district court’s holding that the United States was not entitled to any property and held that the innocent owner defense of the wife did not preclude forfeiture of some interest in the subject property. *Id.* at 74.

201. *Id.* at 77.

202. *Id.* at 76-77.

203. *Id.* at 77-78.

204. *Id.* at 76-77.

205. *Id.* at 76.

206. *Id.* at 77. In fact, the Third Circuit noted that the “statutory language is susceptible to diametrically opposed interpretations.” *Id.* at 76. The court explained that owning property at a tenant by the entirety means owning the whole estate. *Id.* Thus, if a guilty spouse’s interest is forfeited upon a violation of the Drug Control Act, the forfeiture “means forfeiture of the whole estate.” *Id.* Conversely, an innocent spouse retains the entire estate because he or she also owns an indivisible interest in it, thus leaving no interest to be forfeited to the government. *Id.*

207. *Id.* at 76-77.

nocent owners.”²⁰⁸ The court evaluated the analysis of the Eleventh Circuit in *15621 S.W. 209th Avenue*, and rejected it.²⁰⁹ In *15621 S.W. 209th Avenue*, the Eleventh Circuit held that none of the subject property owned by husband and wife as tenants by the entirety could be forfeited under § 881(a)(7) if the innocent owner defense had been invoked.²¹⁰ The Eleventh Circuit did, however, preserve in a footnote the possibility of the government attempting to acquire the husband’s interest in a later forfeiture proceeding, should the entireties estate terminate.²¹¹ The Third Circuit reasoned that this solution was inadequate because it “frustrates the strong governmental interest in forfeiture since it permits a guilty spouse during his or her lifetime to retain title as a tenant by the entireties in property that he or she has used in illegal drug activities.”²¹²

The Third Circuit next considered the opinion of the Sixth Circuit in *2525 Leroy Lane*.²¹³ The court did not expressly adopt the approach of the Sixth Circuit, nor did it examine the analytical framework of *2525 Leroy Lane*, but rather seemed to accept the decision as the underlying rationale for the government’s proposed solution in the case before it.²¹⁴ The approach advocated by the government, which was loosely based on *2525 Leroy Lane*, purportedly provided for the immediate forfeiture of the guilty spouse’s interest in the subject property, while allowing the innocent spouse to retain a life estate in the property with a right of survivorship.²¹⁵ This approach, however, like that of the Sixth Circuit, essentially denies the immediate forfeiture of the subject prop-

208. *Id.* at 77.

209. *Id.* at 77-78; *see also* *United States v. 15621 S.W. 209th Ave.*, 894 F.2d 1511 (11th Cir. 1990). For further discussion of *15621 S.W. 209th Ave.*, *see supra* notes 158-80 and accompanying text.

210. *15621 S.W. 209th Ave.*, 894 F.2d at 1516.

211. *Id.* at 1516 n.6. For further discussion of the Eleventh Circuit’s recognition of the government’s potential interest in the property in *15621 S.W. 209th Ave.*, *see supra* note 169.

212. *1500 Lincoln Ave.*, 949 F.2d at 78.

213. *Id.* at 75, 78; *see* *United States v. 2525 Leroy Lane*, 910 F.2d 343 (6th Cir. 1990), *cert. denied sub nom. Marks v. United States*, 111 S. Ct. 1414 (1991). For a discussion of the Sixth Circuit’s decision in *2525 Leroy Lane*, *see supra* notes 181-99 and accompanying text.

214. *1500 Lincoln Ave.*, 949 F.2d at 75, 77-78. The Third Circuit explained that “[r]elying on the Sixth Circuit’s recent decision . . . , the government contended that it should at least be able to obtain ‘any separate interest which [the husband] would be entitled to should he survive or divorce [the wife] or should the entireties be severed in any other manner.’” *Id.* at 75. The Third Circuit appeared to adopt this solution with little or no examination of the underlying Sixth Circuit opinion. *Id.* at 78.

215. *Id.* at 77. The innocent spouse actually retains all of the property rights of a tenant by the entirety, including the protection “against any conveyance without his or her consent or any attempt to levy upon the interest formerly held by the guilty spouse.” *Id.* at 77-78. Finally, “the innocent owner retains the right to obtain title in fee simple absolute if he or she is predeceased by the guilty spouse.” *Id.* at 78.

erty while recognizing the government's ability to assume the position of a lien creditor of the guilty spouse.²¹⁶ The Third Circuit limited its consideration of the issue to the interpretation offered by the government and other interpretations that would result in a lesser degree of forfeiture.²¹⁷ Rather than seize the opportunity to outline a framework that would provide guidance to other courts considering the same issue, the Third Circuit opted out of fashioning its own solution and ultimately adopted the solution advocated by the government.²¹⁸

E. *Conflict Among the Circuits*

An analysis of the three recent circuit court decisions reveals that all three recognize the inherent conflict that exists between protecting marital property in tenancy by the entirety and effecting the civil forfeiture provisions of § 881(a)(7).²¹⁹ As the dissent in the Sixth Circuit opinion of *2525 Leroy Lane* noted, the Eleventh Circuit in *15621 S.W. 209th Avenue* and the majority in *2525 Leroy Lane* applied the same logic yet arrived at two opposite conclusions.²²⁰ Both the Eleventh and the Sixth Circuits relied on state law to determine the property rights of innocent owners of real property under § 881(a)(7).²²¹ Yet this reliance on state law results in inconsistent dispositions of real property.²²²

Any forfeiture of real property under § 881 depends upon the laws of the state where the real property is located.²²³ In a jurisdiction that adopts the reasoning of the Eleventh Circuit, an innocent spouse is deemed to have an ownership interest in the whole entireties estate which precludes any forfeiture of the subject property to the government.²²⁴ As the dissent in *2525 Leroy Lane* opined, this reasoning seems convoluted, at best, because the spouse accused of using the subject property to facilitate a violation of federal narcotics laws also has an indivisible interest in the entire property.²²⁵ Similarly, the dissent in *2525*

216. See *2525 Leroy Lane*, 910 F.2d at 351-52.

217. *1500 Lincoln Ave.*, 949 F.2d at 77.

218. *Id.* at 77-78.

219. *1500 Lincoln Ave.*, 949 F.2d 73 (3d Cir. 1991); *2525 Leroy Lane*, 910 F.2d 343 (6th Cir. 1990); *15621 S.W. 209th Ave.* 894 F.2d 1511 (11th Cir. 1990).

220. *2525 Leroy Lane*, 910 F.2d at 356 (Krupansky, J., dissenting). The dissent contended that the forfeiture in *15621 S.W. 209th Ave.* was forfeiture in name only. *Id.* (Krupansky, J., dissenting). The government did not gain an alienable property interest, but rather the right to "file [a] lis pendens against the property" noticing the public of an inchoate, undefinable potential cloud on title to the realty." *Id.* (Krupansky, J., dissenting). In essence, the dissent argues that ownership was awarded outright to the innocent spouse. *Id.* (Krupansky, J., dissenting).

221. *Id.*

222. *Id.*

223. See *15621 S.W. 209th Ave.*, 894 F.2d at 1514.

224. See *id.* at 1512; *2525 Leroy Lane*, 910 F.2d at 354.

225. *2525 Leroy Lane*, 910 F.2d at 356 (Krupansky, J., dissenting). The dissent argued that the Eleventh Circuit's decision "[c]onveniently ignor[ed] the

Leroy Lane faults the Sixth Circuit's majority opinion, which essentially places a "final resolution of the real property rights between the owners of the entireties estate and the government in abeyance pending divorce or death."²²⁶ This result defeats the deterrent purpose of the Drug Control Act; the innocent owner is not free to alienate his or her interest in the subject property, and the government is deprived of any meaningful rights in the property because it occupies the position of a "life-long judgment creditor."²²⁷ The Third Circuit, while critical of the logic and analyses in both decisions, failed to provide a solution resolving the conflict in a satisfactory manner.

Due to their inconsistencies, the circuit courts' decisions fail to further the purpose of Congress in enacting the Drug Control Act.²²⁸ In *15621 S.W. 209th Avenue*, the Eleventh Circuit decision confers a benefit on the innocent spouse rather than on the government.²²⁹ The court initially invoked the relation-back doctrine in § 881(h) to find the subject property forfeitable, but proceeded to conclude that no part of the entireties estate could be forfeited because the innocent spouse retained an indivisible interest in the entire estate which could not be severed.²³⁰ Thus, the Eleventh Circuit impliedly finds that the relation-back doctrine severs the entireties estate in favor of the innocent spouse when the wrongdoing occurs.²³¹ Although this conclusion is consistent with congressional intent to protect innocent owners from unjust forfeiture, it directly contravenes the policy underlying the Drug Control Act—to punish wrongdoers for substantive violations of the law.²³² The Eleventh Circuit's decision also ignores the fact that its logic could lead to the opposite conclusion; under the same rationale, the property could be found forfeitable because the entireties estate had been tainted by the wrongdoing of one spouse who held an indivisible interest over the

very tangible ownership interest of the convicted spouse," which also extended to the entire estate. *Id.* (Krupansky, J., dissenting).

226. *Id.* (Krupansky, J., dissenting).

227. *Id.* (Krupansky, J., dissenting).

228. The goal of the Comprehensive Crime Control Act of 1984 was "to enhance the use of forfeiture . . . as a law enforcement tool combatting . . . racketeering and drugtrafficking." S. Rep. No. 225, *supra* note 21, at 192.

229. *15621 S.W. 209th Ave.*, 894 F.2d at 1516 n.6 (noting that interest in property cannot be forfeited at present time because innocent spouse has interest as tenant by the entirety).

230. *Id.* (indicating that government only receives what is left after innocent owner's interest has been taken out).

231. *Id.* However, the Eleventh Circuit further noted that the government could file a *lis pendens* against the property which would enable the government to levy on its interest should the entirety terminate. *Id.* at 1516 n.6. Upon termination of the entirety estate, the interests of the spouses would become "separable so that forfeiture of [the husband's] interest in the property would not affect [the wife's] interest." *Id.*

232. *2525 Leroy Lane*, 910 F.2d at 356 (Krupansky, J., dissenting).

entire property.²³³

Similarly, the Sixth Circuit's decision in *2525 Leroy Lane* is fraught with inconsistencies which weaken the opinion. In *2525 Leroy Lane*, the Sixth Circuit concluded that the government obtained the interest held by the accused spouse upon the commission of the wrongdoing pursuant to the relation-back doctrine.²³⁴ To reconcile this finding and state property law governing tenancy by the entirety, the Sixth Circuit found that the government became a lien creditor of the entireties estate and would remain so until the estate terminated.²³⁵ This decision, like *15621 S.W. 209th Avenue*, is flawed in that it too implicitly relies upon the relation-back doctrine of § 881(h) to effectively sever the entireties estate.²³⁶ As it stands, however, neither the government nor the innocent owner can alienate their interests in the estate. This result not only contravenes state property law, but also thwarts the purpose behind the Drug Control Act by postponing the government's ability to realize its rights until the entireties estate is actually severed or terminated.²³⁷ This decision thus precludes the free alienation of the subject property by the innocent spouse until the entireties estate terminates—a direct contravention of the notions of free alienability of property.

Recognizing the shortfalls of the solutions of the Sixth Circuit and the Eleventh Circuit, the Third Circuit attempted to create a solution that would serve the purpose of the Drug Control Act while protecting the integrity of the entireties estate under state property law. Unfortunately, the Third Circuit failed to achieve its goal. Rather than formulate a solution to address the inherent conflict between state marital property law and the civil forfeiture provisions of § 881(a)(7), the Third Circuit adopted the compromise offered by the government, thereby entirely neglecting to address the issue.²³⁸ The Third Circuit reasoned that the compromise offered by the government remedied the shortfalls of the Sixth and Eleventh Circuits' decisions because it provided for the *immediate forfeiture* of the guilty spouse's interest in the entireties estate

233. *Id.* (Krupansky, J., dissenting).

234. *Id.* at 350-51.

235. *Id.* at 350. In *2525 Leroy Lane*, the subject property had been sold. *Id.* at 345. During the pendency of the proceeding, the parties agreed that the proceeds were to retain the same qualities as the entireties estate. *Id.* The Sixth Circuit remanded the case to the district court to determine the nature of the parties' rights over the proceeds of the sale. *Id.* at 352. The Sixth Circuit instructed the district court to find, on remand, a solution which would be consistent with the Circuit's determination that the innocent wife did not gain title to the entire estate. *Id.* Such a finding would have effectively eliminated the government's interest, thereby granting the wife a windfall. *Id.* The Sixth Circuit also instructed the district court to review the case consistent with its determination that the government occupied the position of a judgment creditor of one spouse under Michigan law. *Id.* at 351.

236. *Id.* at 353-56 (Krupansky, J., dissenting).

237. *See id.* at 352.

238. *1500 Lincoln Ave.*, 949 F.2d 73, 77-78 (3d Cir. 1991).

while protecting the innocent spouse's interest in the entireties estate.²³⁹

The Third Circuit views its decision as a remedy for the inherent conflict between the interests of the innocent spouse and the goals of the Drug Control Act; however, the opinion glosses over the fact that the "immediate" forfeiture to the government amounts to forfeiture in name only. In actuality, the Third Circuit's solution differs little from that of the Sixth Circuit. In both scenarios, the government's interest is effectively placed in abeyance until the entireties estate terminates through death or divorce. Thus, the Third Circuit decision does not really provide a viable third alternative.

The Third Circuit opted out of an independent analysis and accepted a compromise without fully considering the underlying conflict or the consequences of its inaction. The Third Circuit stated that it had adopted the government's compromise because it best served the dual purposes of the Drug Control Act; however, that assertion is not true.²⁴⁰ By failing to address the issue directly, the Third Circuit rejected the opportunity to resolve the underlying conflict by reconciling the competing interests of the government and the innocent spouse. Instead, the Third Circuit adopted a fact-specific solution which resolved the case before it but provided little if any guidance to other courts considering the issue.²⁴¹

As suggested by the Sixth Circuit dissent in *2525 Leroy Lane*, the only equitable solution to this issue may be the development of preemptive federal common law.²⁴² This common law would define the rights of both the innocent owner spouse and the government when the subject property is used to facilitate a violation of the Drug Control Act.²⁴³ A federal rule of common law that converts the entireties estate into a tenancy in common between the innocent spouse and the government when the wrongdoing occurs might provide for more consistent results.²⁴⁴ This solution is not ideal because the innocent property owner's rights are diminished when the estate is converted into a ten-

239. *Id.*

240. *Id.*

241. As the Third Circuit itself recognized, the compromise offered by the government gave the court an easy "out." *Id.* at 77. In the words of the Third Circuit, "[i]n light of the government's position, we need not consider possible interpretations that would provide for a greater degree of forfeiture." *Id.*

242. *2525 Leroy Lane*, 910 F.2d 343, 353 (Krupansky, J., dissenting). The majority specifically rejected the government's contention that the courts should develop federal common law to deal with property rights in forfeiture actions. *Id.* at 347-49.

243. *Id.* at 356 (Krupansky, J., dissenting). The "paramount government interest" in creating the forfeiture laws is to create "a uniform, immediate, certain, harsh and efficacious sanction against those who elect to profit from a venture as pernicious as trading drugs." *Id.* at 354.

244. *Id.* at 356 (Krupansky, J., dissenting).

ancy in common; however, it is an equitable compromise which would provide a solution to this conflict that is amenable to consistent application.²⁴⁵ Furthermore, this solution would not necessarily undermine the sanctity of the entirety estate because the uniform federal common law would only override the system of property ownership in the particular situation of illicit use of property under the Drug Control Act. Unless and until Congress addresses this issue by amending the statute to resolve the conflict between federal civil forfeiture laws and state marital property law, equity calls upon the federal courts to develop federal common law. Federal common law would not only provide guidance, but would also provide “certainty, uniformity and efficacy in [civil] forfeiture” of real property under the Drug Control Act.²⁴⁶

IV. CONCLUSION

The lack of consistent judicial precedent combined with the lack of concrete legislative history regarding the civil forfeiture provisions of the Drug Control Act mandate the development of federal common law. Federal common law in this area would resolve the conflict between federal forfeiture laws and state marital property laws in jurisdictions where spouses own property as tenants by the entirety. Federal common law would also provide guidance to courts considering the issue and would result in more consistent decisions regarding the disposition of property deemed forfeitable upon a violation of the Drug Control Act. Given the pressing need to provide federal law enforcement officials with powerful weapons to wage the escalating war on drugs, and the inconsistencies that result when state property law is applied to determine the property rights of the innocent spouse and the government, the development of federal common law may be the most equitable and intellectually honest solution until Congress provides a statutory resolution of this issue.

Anne-Marie Feeley

245. *Id.* at 354-56 (Krupansky, J., dissenting).

246. *Id.* at 356 (Krupansky, J., dissenting).

